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In The
Supreme Court of the United States

SPEECHNOW.ORG, *et al.*,

Petitioners,

v.

FEDERAL ELECTION COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Citizens United v. FEC*, this Court held that the government cannot require a corporation to speak through a political committee or "PAC" as an alternative to banning the corporation's speech outright. In direct conflict with that holding, the D.C. Circuit held that SpeechNow.org – an unincorporated group that makes only independent expenditures and thus poses no risk of corruption or its appearance – must organize as a political committee in order to speak.

The question presented is whether, under the Free Speech Clause of the First Amendment, the federal government may require an unincorporated association that makes only independent expenditures to register and report as a political committee despite the fact that a more narrowly tailored means of disclosing its independent expenditures exists in 2 U.S.C. § 434(c).

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the following five individuals were parties in the court of appeals proceeding: David Keating, Fred M. Young, Jr., Edward H. Crane III, Brad Russo, and Scott Burkhardt.

The parties to this proceeding are the five individuals listed above and the Federal Election Commission. Because SpeechNow.org was not a party to the D.C. Circuit's ruling under 2 U.S.C. § 437h, but rather a party to a consolidated appeal of a preliminary injunction denial, the organization itself is not a party to this petition. It remains in the caption only because it is the caption that was used by the court below. However, David Keating, SpeechNow.org's president and treasurer, is subject to both official and personal liability if SpeechNow.org violates the law, and therefore has standing to assert SpeechNow.org's claims. *See* Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 3, 3-6 (Jan. 3, 2005); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 187 n.6 (1981).

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Herbert E. Alexander, *Financing Politics: Money, Elections, and Political Reform* (4th ed. 1992) 33

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PETITION FOR A WRIT OF CERTIORARI

David Keating, Fred M. Young, Jr., Edward H. Crane III, Brad Russo, and Scott Burkhardt respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-26) is reported at 599 F.3d 686. The decision of the district court certifying Petitioners' constitutional questions (App. 31-53) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech." Sections 431 and 432 through 434 of Title 2

of the United States Code are reproduced in the appendix to this petition. App. 54-115.

STATEMENT OF THE CASE

This case raises the question of whether the government may impose the full panoply of burdensome requirements that apply to political committees or "PACs" on a group that makes only independent expenditures. The group – known as SpeechNow.org – will willingly comply with the same sort of disclosure and disclaimer provisions that Congress provided for groups, other than PACs, that make independent expenditures. These provisions, which are very similar to those this Court upheld in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), as they applied to corporations, are far less burdensome than the PAC requirements that the Court struck down in *Citizens United*. The question is thus whether the government can impose burdensome PAC requirements on groups like SpeechNow.org when this Court, in *Citizens United*, just held that those same requirements cannot be applied to corporations.

I. Background

Petitioner David Keating, the president and treasurer of SpeechNow.org, is a long-time political activist and supporter of First Amendment rights. App. 4. Along with Petitioner Edward Crane and others, Mr. Keating founded SpeechNow.org in October 2007 to

give individuals the opportunity to protect the First Amendment at the ballot box by advocating the election or defeat of candidates based on their support for free speech. App. 34, 37, 180-81.

SpeechNow.org is an unincorporated association organized under section 527 of the Internal Revenue Code. App. 4. SpeechNow.org will make only independent expenditures – that is, expenditures made without consultation or coordination with any candidate or party – which it will fund with donations from individuals such as Messrs. Keating and Crane and Petitioners Fred Young, Brad Russo, and Scott Burkhardt. App. 35-37; *see also* 2 U.S.C. § 431(17). Under its bylaws, SpeechNow.org is required to maintain the independence of its expenditures under relevant campaign finance regulations, and it is prohibited from making direct contributions to candidates. App. 36. As a result, SpeechNow.org poses no threat of corruption. *See Citizens United*, 130 S. Ct. at 909 (2010).

SpeechNow.org's operations are transparent. It will disclose its independent expenditures and the contributions that fund them under 2 U.S.C. § 434(c), which applies to persons other than political committees, and it will include disclaimers on its communications under 2 U.S.C. § 441d. App. 51-52. Moreover, because SpeechNow.org's bylaws prevent it from accepting earmarked donations, all of its donors who contribute more than $200 will be disclosed under § 434(c). App. 41, 43-44.

Despite these facts, federal law requires Speech Now.org to become a "political committee" or "PAC" because it has a "major purpose" of federal campaign activity and will raise or spend more than $1,000 toward that end. *See* 2 U.S.C. § 431(4); Supplemental Explanation & Justification, 72 Fed. Reg. 5595, 5601 (Feb. 7, 2007). PACs are subject to limits on the contributions they receive and must register with the Federal Election Commission ("FEC") and comply with detailed administrative, organizational, and continuous reporting requirements. *See* 2 U.S.C. §§ 432, 433, 434(a).

As this Court held in *Citizens United*, "PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations." 128 S. Ct. at 897. Those burdens are at least as significant when applied to unincorporated groups such as SpeechNow.org as they are when applied to corporations. David Keating has a full-time job and runs SpeechNow.org from his home in his spare time. App. 274. SpeechNow.org has no affiliated corporation to help defray its start-up and fundraising costs or pay its administrative expenses. App. 50; *see also* 11 C.F.R. § 114.5(b). Among many other burdens imposed by PAC status, Mr. Keating will be required to register with the FEC before speaking and keep detailed records of contributions and expenditures. 11 C.F.R. §§ 102.1(d), 102.9(a)(4)(i)-(ii), 102.9(b)(2), 102.9(c), 103.3. He will also have to account for the fair-market value of the portion of his home used by the group – including such things as telephone and Internet

connections – in much the same way an individual would have to account for a home office on his income taxes. App. 50-51. Even to terminate SpeechNow.org's operations, Mr. Keating will have to obtain approval from the FEC. 11 C.F.R. § 102.3(a)(1).

PACs are also subject to complicated reporting obligations, which apply regardless of whether the PAC spends money on federal elections during any election season. 11 C.F.R. § 104.1(a). The disclosure form for PACs – FEC Form 3X – consists of five pages of summary information on receipts and disbursements followed by sixteen different "schedules" and 31 pages of instructions. 11 C.F.R. § 104.2(e)(3).[1] These disclosures are due multiple times a year, and at different times depending on the year or the elections in which the PAC is participating. 11 C.F.R. § 104.5(c). In addition to this general reporting, PACs must separately disclose any independent expenditures they make. 11 C.F.R. § 104.5(g).

In contrast, groups other than PACs – such as *MCFL* groups[2] and, after *Citizens United*, corporations and unions – may operate free of the organizational, administrative, and reporting requirements

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[1] FEC Form 3X is available at http://www.fec.gov/pdf/forms/fecfrm3x.pdf. Instructions and Related Schedules are available at http://www.fec.gov/pdf/forms/fecfrm3xi.pdf.

[2] *MCFL* groups are 501(c)(4) corporations that meet certain additional criteria announced in this Court's ruling in *FEC v. Mass. Citizens for Life, Inc.* (*MCFL*), 479 U.S. 238 (1986). *See* 11 C.F.R. § 114.10(c) (defining "qualified nonprofit corporations").

that apply to PACs. Those groups need only report their independent expenditures as they are made. *See* 2 U.S.C. § 434(c). FEC Form 5, which is used for reporting independent expenditures, is six pages long, including instructions. App. 48-49. As a 527 group, SpeechNow.org must also report certain information to the IRS. *See* 26 U.S.C. § 527(j). However, those reporting obligations apply only when a group reasonably anticipates that it will have gross receipts of $25,000 or more during a taxable year. *Id.* § 527(j)(5)(D). Moreover, a 527 group is subject to reporting requirements only so long as it wishes to maintain its tax-exempt status. *Id.* § 527(j)(1).

In November 2007, SpeechNow.org filed an Advisory Opinion Request with the FEC seeking approval to operate SpeechNow.org free of the onerous requirements and funding limitations that apply to PACs. App. 179-221. Along with the request, Speech Now.org submitted two scripts for proposed advertisements calling for the defeat of United States Senator Mary Landrieu (D-LA) and United States Representative Dan Burton (R-IN), both of whom had supported anti-free-speech campaign finance laws in the past. App. 42-43. The group also submitted price quotes for the production and airing of the advertisements, which SpeechNow.org wanted to air during the 2008 election season. App. 43. SpeechNow.org had received enough pledges of support from the individual Petitioners and one other individual to finance the production and airing of the ads in the relevant locales. However, because SpeechNow.org

was considered a PAC under the campaign finance laws and subject to contribution limits, it could not accept the proposed donations to produce and air its ads. App. 45-46.

In January 2008, the FEC denied SpeechNow.org's advisory opinion request. App. 222-23.

II. Proceedings Below

Petitioners filed this case in the United States District Court for the District of Columbia on February 14, 2008, alleging that the campaign finance laws violated the First Amendment as applied to SpeechNow.org and its donors by both limiting the amount any individual could contribute to Speech Now.org and by requiring SpeechNow.org to register with the FEC and operate as a PAC. App. 286. Specifically, Petitioners challenged the registration, administrative, and continuous reporting requirements for PACs contained in 2 U.S.C. §§ 431(4), 431(8), 432, 433, and 434(a) and the contribution limits contained in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3).

Along with their complaint, Petitioners filed a motion to preliminarily enjoin the contribution limits, which prevented SpeechNow.org from accepting the funds necessary to finance its planned advertisements. App. 286-87. The district court denied that motion on July 1, 2008. App. 294-95. As a result, SpeechNow.org was unable to produce and broadcast its advertisements during the 2008 election cycle.

SpeechNow.org intends to produce and broadcast similar ads during the 2010 election cycle and other elections in the future. App. 5. Petitioners timely appealed the district court's denial of their preliminary injunction motion. App. 296.

While that appeal was pending, the merits of the case proceeded in the district court pursuant to 2 U.S.C. § 437h. Under that provision, district courts "immediately shall certify" certain constitutional challenges to the Federal Election Campaign Act ("FECA") "to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc." On June 27, 2008, Petitioners made a motion to certify five questions to the D.C. Circuit, arguing that no discovery or further factual development was necessary. App. 294. On July 29, 2008, the district court granted the motion to certify Petitioners' five questions, but ordered that the FEC be permitted to conduct discovery and develop a factual record. App. 297. On February 3, 2009, the parties completed briefing on proposed findings of fact. App. 310. The FEC's proposed findings of fact comprised 137 pages, including 452 proposed facts and over 2,000 pages of exhibits. App. 301. Roughly six months later, the district court ordered the parties to submit a list of disputed and undisputed facts, and, on September 28, 2009, the court entered 65 factual findings and submitted the case to the D.C. Circuit. App. 31-53.

On October 26, 2009, the D.C. Circuit consolidated the merits with Petitioners' preliminary injunction appeal. App. 6. On March 26, 2010, the en

banc D.C. Circuit issued its ruling. Recognizing that SpeechNow.org's independent expenditures raise no concerns about corruption, the court held that the contribution limits in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3) were unconstitutional as applied to SpeechNow.org and its individual contributors. App. 20. As a result, the court vacated the district court's order denying the Petitioners' motion for preliminary injunction. The D.C. Circuit also held, however, that SpeechNow.org could constitutionally be required to register and operate as a PAC as soon as it raised more than $1,000 to fund its independent expenditures. App. 25.

REASONS FOR GRANTING THE PETITION

The court of appeals disregarded recent Supreme Court precedent on an issue of national importance – political speech – where burdensome regulations and uncertainty pose an unacceptable risk of chilling the exercise of core First Amendment rights.

In *Citizens United v. FEC*, this Court recently reaffirmed a fundamental constitutional principle: Independent expenditures are core political speech that create no concerns about corruption and thus may not be limited. 130 S. Ct. 876, 909 (2010). As a result, the Court struck down 2 U.S.C. § 441b, which prohibited corporations from making independent expenditures unless they created separate segregated funds or "PACs" to do their independent spending for

them. "PACs," the Court recognized, "are burdensome alternatives" which are "expensive to administer and subject to extensive regulations." *Id.* at 897. Just as the government may not ban speech directly, held the Court, so it may not achieve the same result through indirect means such as requiring a corporation to speak through a heavily regulated PAC. *Id.* at 897-98.

Roughly two months later, the D.C. Circuit decided *SpeechNow.org v. FEC*. The court followed *Citizens United* in striking down a limit on contributions to the group. App. 20. However, despite recognizing that SpeechNow.org poses no threat of corruption and will comply with relevant disclosure and disclaimer laws, the D.C. Circuit held that the government could require the group to become a PAC in order to make independent expenditures. App. 24-25.

The D.C. Circuit's decision conflicts with *Citizens United* in at least two significant ways. First, whereas *Citizens United* concluded that PACs are "burdensome alternatives" as a matter of law, the D.C. Circuit concluded that requiring SpeechNow.org to speak through a PAC did not amount to a significant burden on its speech. App. 22-25.

Second, whereas *Citizens United* subjected the PAC alternative to strict scrutiny, the D.C. Circuit treated PAC status as merely a disclosure law that triggered only intermediate scrutiny. App. 20-21. This alone was erroneous, but the D.C. Circuit also misapplied intermediate scrutiny, both by placing the

onus on SpeechNow.org to demonstrate that the PAC requirements burdened its speech and by ignoring the more narrowly tailored disclosure and disclaimer provisions in 2 U.S.C. §§ 434(c) and 441d that Congress created for individuals and groups that make only independent expenditures. Section 441d is the very same disclaimer provision this Court upheld for corporations in *Citizens United*. Section 434(c) is substantially similar to § 434(f), the disclosure provision upheld in *Citizens United*, 130 S. Ct. at 914, except that § 434(c) provides more information because its disclosure thresholds are lower. As a result, there is simply no constitutionally adequate grounds for requiring SpeechNow.org to become a PAC.

In many ways, the D.C. Circuit's decision turned *Citizens United* on its head. In *Citizens United*, this Court concluded that PAC requirements are too burdensome for corporations, yet the D.C. Circuit has now concluded that those same requirements are *not* too burdensome for a small association of individuals. In *Citizens United*, this Court held that First Amendment rights cannot turn on the identity of the speaker, yet, following the D.C. Circuit's ruling, an unincorporated association like SpeechNow.org must become a PAC in order to make unlimited independent expenditures, while corporations and unions may do so without becoming a PAC. In *Citizens United*, this Court recognized that complex rules chill speech, and noted that the "[c]ampaign finance regulations now impose 'unique and complex rules' on '71 distinct entities.'" 130 S. Ct. at 895. Yet the D.C.

Circuit has now created distinct entity number 72: the "independent expenditure PAC," which is not subject to limits on amounts contributed to it but still must comply with the other regulations that apply to PACs.

The D.C. Circuit's decision raises important issues of national significance, because its effect will be to chill speech that this Court has long sought to protect. The result of the decision is the imposition of greater burdens on unincorporated associations that wish to make independent expenditures than now exist for large corporations and unions that wish to do the same thing.

Furthermore, the D.C. Circuit's decision exacerbated an already confusing standard for determining who is and who is not a PAC. The FEC has long used the so-called "major purpose" test to determine which groups must become PACs. Under this test, if the FEC determines, after a fact-intensive, case-by-case analysis, that a group has spent a sufficiently large percentage of its funds on federal campaign activity – even entirely independent advocacy – it must become a PAC. *See* Supplemental Explanation & Justification, 72 Fed. Reg. 5595, 5601 (Feb. 7, 2007).

Although the D.C. Circuit's conclusion that Speech Now.org can constitutionally be required to become a PAC was not based expressly on the group's "major purpose," the court's decision will allow the FEC to make every unincorporated group a PAC if it spends too much money on independent expenditures. Indeed,

the D.C. Circuit's decision raises the question of whether any group, corporate or non-corporate, must become a PAC if the group either cannot demonstrate that PAC status is sufficiently burdensome or spends enough money on independent expenditures to cross the "major purpose" threshold. Accepting this case for review would give the Court the opportunity to clarify that the proper constitutional touchstone for PAC status is not the amount of independent speech in which a group engages, but whether it poses a threat of corruption.

This Court's decision in *Citizens United* was crystal clear: "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech." 130 S. Ct. at 904. Petitioners are a group of citizens who wish to spend their own money on their own political speech. Under the D.C. Circuit's ruling, they must become a PAC – and must register with the government and comply with numerous regulatory burdens – just to be able to speak. *Cf. id.* at 895-96 (analogizing complex campaign finance laws to a prior restraint). The D.C. Circuit's ruling conflicts with *Citizens United* and should be reversed.

I. In Holding That an Association of Citizens Must Become a PAC in Order to Make Unlimited Independent Expenditures, the D.C. Circuit's Decision Directly Conflicts with This Court's Decision in *Citizens United v. FEC*.

A. The D.C. Circuit disregarded this Court's holding that PACs are burdensome as a matter of law.

For over twenty years, this Court has recognized the significant burdens PACs impose on those who wish to spend money on speech. *See, e.g.*, *FEC v. Mass. Citizens for Life, Inc.* (*MCFL*), 479 U.S. 238, 253-55 (1986) (plurality opinion); *FEC v. Wis. Right to Life, Inc.* (*WRTL II*), 551 U.S. 449, 477 n.9 (2007). As the Court held in *Citizens United*,

> PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations. For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organizational statement and report changes to this information within 10 days. And that is just the beginning. PACs must file detailed monthly reports with the FEC, which are due at different times depending on the type of election that is about to occur[.] . . . PACs have to comply with these regulations just to speak.

130 S. Ct. at 897 (internal citations omitted).

As a result, despite the existence of the PAC alternative, the Court concluded that "[§] 441b's prohibition on corporate independent expenditures is thus a ban on speech." *Id.* at 898; *see also id.* at 897 (stating that "the option to form PACs does not alleviate the First Amendment problems with § 441b"). Accordingly, the Court treated both § 441b's outright ban on corporate independent expenditures and the PAC alternative as essentially indistinguishable for First Amendment purposes and subjected both to strict scrutiny. *Id.* at 898. Because Citizens United's independent expenditures posed no threat of corruption, the Court struck down both requirements as a violation of the First Amendment. *Id.* at 897-98, 913. Later, the Court upheld the disclosure and disclaimer provisions for those who make electioneering communications as the appropriately narrowly tailored means of achieving the government's interest in disclosure. *Id.* at 913-916.

The same approach should logically apply to an unincorporated group like SpeechNow.org. While the precise statutory provisions that apply to Speech Now.org are different from those that applied to corporations, the result is the same: SpeechNow.org is prohibited from making unlimited independent expenditures unless it becomes a PAC. As a group that will devote the majority of its funds to express advocacy, SpeechNow.org is defined as a "political committee" and may not make independent expenditures without complying with all the organizational

and reporting obligations for a PAC. *See* 2 U.S.C. § 431(4); App. 235-40.

The PAC requirements are thus every bit as burdensome for groups like SpeechNow.org as they were for corporations. Like corporations prior to *Citizens United*, SpeechNow.org must register with the FEC, appoint a treasurer, and comply with all the other expensive and onerous restrictions that apply to PACs. *See* 2 U.S.C. §§ 432, 433, 434(a). Like corporations, SpeechNow.org and similar groups must first establish a PAC "before they can speak." *Citizens United*, 130 S. Ct. at 898. And "[g]iven the onerous restrictions" of PAC status, SpeechNow.org or other groups "may not be able to establish a PAC in time to make its views known regarding candidates and issues in a current campaign." *Id.* The PAC requirement therefore operates as a "restriction on the amount of money" that SpeechNow.org may spend during a campaign, just as it would for a corporation. *Id.*

The D.C. Circuit disregarded *Citizens United* on this point entirely and treated PAC status as a run-of-the-mill disclosure requirement. Noting that Speech Now.org "intends to comply with the disclosure requirements applicable to those who make independent expenditures" under § 434(c), the D.C. Circuit upheld the PAC requirements on the ground that they allegedly imposed little additional burden on SpeechNow.org. App. 23.

The D.C. Circuit thus ignored a central point of this Court's entire analysis of the PAC requirements

in *Citizens United* – that PACs are unduly burdensome and thus a significant regulation of speech *as a matter of law*. Indeed, the Court in *Citizens United* concluded that PAC status burdens speech despite the fact that Citizens United itself had previously operated a PAC. *See* 130 S. Ct. at 929 (Stevens, J., dissenting) (noting that Citizens United operated a PAC "with millions of dollars in assets"). The Court came to similar conclusions in both *MCFL* and *WRTL II*. As it explained in *MCFL*, the group's previous operation of a political committee did not change the conclusion that PAC status is burdensome "for [its] speech may well have been inhibited due to its inability to form such an entity before that date. Furthermore, other organizations comparable to MCFL may not find it feasible to establish such a committee, and may therefore decide to forgo engaging in independent political speech." *MCFL*, 479 U.S. at 255 n.8; *see also WRTL II*, 551 U.S. at 477 n.9.

In stark contrast to this Court's long recognition that PAC requirements are burdensome for groups, like MCFL and Citizens United, that make independent expenditures, the D.C. Circuit stated "[b]ecause SpeechNow intends only to make independent expenditures, the additional reporting requirements that the FEC would impose on SpeechNow if it were a political committee are minimal." App. 23. Indeed, the D.C. Circuit went as far as to directly contradict this Court's conclusion that PAC regulations such as the necessity of appointing a treasurer and retaining records are burdensome. *Citizens United*, 130 S. Ct.

at 897. As the D.C. Circuit stated, "[n]or do the organizational requirements that SpeechNow protests, such as designating a treasurer and retaining records, impose much of an additional burden upon SpeechNow, especially given the relative simplicity with which SpeechNow intends to operate." App. 23.[3]

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[3] The D.C. Circuit claimed that Petitioners conceded at oral argument that PAC reporting will not impose an additional burden on SpeechNow.org. App. 23. However, the question posed at this point in the argument was not whether the burdens of PACs were minimal, but whether, assuming SpeechNow.org were relieved of *all other aspects of PAC status*, reporting independent expenditures in the same manner as a PAC would constitute much of an additional burden over reporting on the forms used by non-PACs.

> Judge Sentelle: Assume you don't have to be a [PAC], assume you've won that part . . . and we're just talking about whether you're nonetheless required under the reporting requirements. . . . So, just calling you a [PAC] . . . and not making you do anything except the reporting is not really going to impose an additional burden on you, right? If everything else [is] unconstitutional except that, the reporting requirement by itself –

App. 129. The answer, as counsel stated several times during oral argument, is that the precise forms that PACs use to report independent expenditures are similar to the form other groups use. App. 123-25, 129-30. But as counsel also pointed out, it is not "appropriate then to conclude from that that the burden is the same." App. 124. The additional burdens associated with being a PAC are, among other things, the "burden that the Supreme Court talked about [in *Citizens United*], having to plow through hundreds of rules to decide all of your obligations," App. 124-25; "appointing a treasurer [and] having to forward all receipts to the treasurer within a certain amount of time," App. 126-27; "the time that it takes to set up the committee," App.

(Continued on following page)

If the D.C. Circuit's treatment of PAC status as a mere incremental burden over other disclosure laws were appropriate, this Court would have undoubtedly taken the same approach in *Citizens United*. Citizens United had to comply with the far less burdensome provisions of 2 U.S.C. § 434(f), which require disclosure for those who make electioneering communications. *See Citizens United*, 130 S. Ct. at 914. Like the D.C. Circuit, this Court could have concluded that PAC regulations were simply additional disclosure requirements and thus a mere incremental burden over the other disclosure laws with which Citizens United had to comply. Indeed, the Court could have done the same thing in *MCFL*. *See* 479 U.S. at 262 (noting that MCFL would disclose under § 434(c)).

The Court did not take this approach, however. In *Citizens United*, it recognized PAC status for what it was – a uniquely burdensome regulation of speech that will "necessarily reduce[ ] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the

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128; having to track and report every penny that goes through the organization, App. 135-36; and having to comply with these burdens before even knowing whether the group has raised enough money to speak. App. 131-32. In short, as counsel stated during oral argument, Petitioners' argument "is precisely the point the Supreme Court made in *Citizens United*. In other words, we aren't saying that it's just a matter of filling out a precise form and that one form is more burdensome than another, we are saying that the entire mechanism of having to spend through a [PAC], create a separate [PAC], become an entirely different type of organization" is the burden. App. 122.

audience reached." 130 S. Ct. at 898 (quoting *Buckley v. Valeo*, 424 U.S. 1, 19 (1976)). This conclusion applies regardless of the precise circumstances and abilities of particular speakers for "[p]rolix laws chill speech for the same reason that vague laws chill speech: People 'of common intelligence must necessarily guess at [the law's] meaning and differ as to its application.'" *Id.* at 889 (second alteration in original); *see also id.* at 890-91 (declining to adopt standards based on particular circumstances of particular speakers). Accordingly, this Court did not hold that corporations could only make independent expenditures through their PACs; it held that they could make unlimited independent expenditures without the necessity of creating PACs at all.

In holding to the contrary, the D.C. Circuit applied precisely the case-by-case approach that this Court rejected in *Citizens United*. *See id.* at 891 ("Courts, too, are bound by the First Amendment. We must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker.") As this Court stated, "First Amendment standards . . . 'must give the benefit of any doubt to protecting rather than stifling speech.'" *Id.* (quoting *WRTL II*, 551 U.S. at 469).

B. The D.C. Circuit failed to apply strict scrutiny to the PAC requirements and it misapplied intermediate scrutiny.

It is black-letter First Amendment law that "[l]aws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Citizens United*, 130 S. Ct. at 898 (quoting *WRTL II*, 551 U.S. at 464); *see also Davis v. FEC*, 128 S. Ct. 2759, 2772 (2008); *MCFL*, 479 U.S. at 256, 261. Consistent with this general rule, the Court in *Citizens United* subjected both § 441b's outright ban on corporate independent expenditures and the PAC alternative to strict scrutiny and struck them down. 130 S. Ct. at 897-98, 913. Later, applying intermediate scrutiny, the Court upheld narrower and far less burdensome disclosure and disclaimer provisions. *Id.* at 913-16.

SpeechNow.org should be treated the same as the corporation at issue in *Citizens United*. SpeechNow.org's independent expenditures pose no threat of corruption. The PAC requirements that apply to SpeechNow.org are virtually identical to those that applied to Citizens United. *See* 11 C.F.R. § 100.5(b) (defining "separate segregated funds" as PACs). And SpeechNow.org will comply with disclosure and disclaimer provisions that are virtually identical to those this Court upheld in *Citizens United*. This case is therefore on all fours with *Citizens United* and the outcome should be the same.

The D.C. Circuit did not reach the same result, however. Inexplicably, the D.C. Circuit chose to carve out PAC requirements as they applied to Speech Now.org and to treat them like simple disclosure laws rather than the inherently burdensome speech restrictions that they are. App. 20-25. In so doing, the D.C. Circuit not only failed to apply strict scrutiny to the PAC requirements; it completely misapplied even intermediate scrutiny. In short, under any level of scrutiny, SpeechNow.org cannot be required to become a PAC simply to make independent expenditures.

Intermediate scrutiny is not an invitation to uphold any laws that can be described as serving the ends of disclosure. Indeed, as this Court held in *Davis v. FEC*, disclosure laws "'cannot be justified by a mere showing of some legitimate governmental interest.'" 128 S. Ct. at 2775 (quoting *Buckley*, 424 U.S. at 64). Instead, the government must show a "substantial relation" between its interests in disclosure and the information sought to be disclosed. *Id.* Further, the "strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Id.*

As shown in the previous section, the D.C. Circuit ignored this Court's conclusion from *Citizens United* that PACs are burdensome as a matter of law. But the D.C. Circuit also misunderstood how the narrowly tailored disclosure provisions that Congress itself created for those who make independent expenditures – 2 U.S.C. §§ 434(c) & 441d – affected

the constitutional analysis. *Davis* is instructive on this point. In *Davis*, this Court struck down disclosure requirements that were designed to implement the "millionaires amendment," which the Court had also invalidated. 128 S. Ct. at 2775. The government argued that the disclosure requirements should be upheld because they would yield additional relevant information, even though the candidates subjected to the amendment were already required to disclose under provisions that applied to all candidates. Brief of Appellee at 28, *Davis v. FEC*, 128 S. Ct. 2759 (2008) (No. 07-320). The Court rejected this argument, however, and concluded that without the millionaires amendment, "the burden imposed by [the amendment's disclosure requirements] cannot be justified." 128 S. Ct. at 2775.

Both *Davis* and *Citizens United* support the principle that disclosure laws must be narrowly tailored to fit their legitimate ends. *See also, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (recognizing that the government must demonstrate narrow tailoring under intermediate scrutiny). Moreover, everything the D.C. Circuit claimed as a justification for requiring SpeechNow.org to become a PAC – for example, that SpeechNow.org could allegedly avoid reporting contributions made exclusively for administrative expenses[4] and that requiring Speech

[4] In fact, because SpeechNow.org does not accept earmarked donations, it will end up disclosing all contributions that come within the terms of § 434(c). App. 120-21, 268.

Now.org to become a PAC would facilitate the detection of violations of other laws – could just as easily be said about Citizens United or any *MCFL* group. Yet in both cases, this Court refused to require such groups to become PACs. *See Citizens United*, 130 S. Ct. at 897-98; *MCFL*, 479 U.S. at 252-56 (plurality opinion).

The D.C. Circuit also misapplied *Buckley* and *McConnell v. FEC*, 540 U.S. 93 (2003), on which it relied for the proposition that this Court "has consistently upheld organizational and reporting requirements against facial challenges." App. 21. In fact, both cases support Petitioners' argument.

The portion of *Buckley* on which the D.C. Circuit relied did not facially uphold PAC requirements, as the court implied. *See* App. 21 (citing *Buckley*, 424 U.S. at 66). Instead, it was a discussion of the "general principles" that apply to disclosure. Indeed, this Court ended that discussion with a point that supports Petitioners' argument – that "disclosure requirements, *as a general matter*, directly serve substantial governmental interests" but "[i]n determining whether these interests are sufficient to justify the requirements *we must look to the extent of the burden that they place on individual rights*." 424 U.S. at 68 (emphasis added). It then went on to uphold a narrowly tailored disclosure requirement – old § 434(e) – that imposed a limited burden on First Amendment rights. *Id.* at 75-82. Section 434(e) is the

precursor to § 434(c), which Petitioners believe *should* apply to SpeechNow.org.[5]

Similarly, in the portion of *McConnell* on which the D.C. Circuit relied, this Court upheld the same narrow disclosure and disclaimer provisions that it upheld in *Citizens United*. *See* 540 U.S. at 196. Those provisions require the same disclaimers SpeechNow.org will utilize for its independent expenditures and disclosures that are substantially the same as those required by § 434(c). *See id.*

In short, *Buckley*, *McConnell*, *Davis*, and *Citizens United* confirm that SpeechNow.org cannot be forced to become a PAC simply for the sake of disclosure. SpeechNow.org will comply with the same disclosure and disclaimer provisions that apply to any speaker who poses no threat of corruption. No matter what level of scrutiny applies, there are no good grounds for requiring SpeechNow.org to become a PAC anymore than there were for Citizens United.

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[5] In 1979, Congress amended § 434(e), raising the reporting threshold from $100 to $250 and renumbering the provision as § 434(c). *See* Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (Jan. 8, 1980).

II. This Case Raises Important Issues of National Significance Regarding the Scope of Regulation of Groups That Make Independent Expenditures.

The D.C. Circuit disregarded the importance of independent political speech under our constitutional scheme. The perverse result of the D.C. Circuit's decision is that unincorporated associations like SpeechNow.org face a greater burden in making independent expenditures than do corporations or unions. That result cannot be squared with this Court's precedents.

Citizens United stands not only for the proposition that the government may not ban certain speakers from making independent expenditures, but also that it may not so burden independent political speech that speakers will avoid the effort altogether. *See* 130 S. Ct. at 898-99. Indeed, the principle that burdensome laws chill speech virtually leaps out from every page of the Court's decision. "The First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . or seek declaratory rulings before discussing the most salient political issues of our day." *Id.* at 889. "[P]olitical speech . . . is stifled if the speaker must first commence a protracted lawsuit." *Id.* at 895. "As additional rules are created for regulating political speech, any speech arguably within their reach is chilled." *Id.* The campaign finance laws "function as the equivalent of prior restraint by giving the FEC power analogous to

licensing laws implemented in 16th- and 17th-century England . . . ." *Id.* at 896.

Citizens United is not alone in this respect. This Court has long recognized that speech needs breathing room to survive. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964). Indeed, in *Buckley*, the Court upheld limits on direct contributions because they focused on "the narrow aspect of political association where the actuality and potential for corruption have been identified *while leaving persons free to engage in independent political expression.*" 424 U.S. at 28 (emphasis added); *see also Citizens United*, 130 S. Ct. at 901-02 (relying on *Buckley*'s distinction between direct contributions and independent expenditures); *id.* at 908 (stating that "[l]imits on independent expenditures, such as § 441b, have a chilling effect extending well beyond the Government's interest in preventing *quid pro quo* corruption").

As the Court stated in *Citizens United*, "it is our law and our tradition that more speech, not less, is the governing rule." *Id.* at 911. Put more simply, "the tie goes to the speaker, not the censor." *WRTL II*, 551 U.S. at 474; *see also Citizens United*, 130 S. Ct. at 898 (stating that "political speech must prevail against laws that would suppress it, whether by design or inadvertence").

The D.C. Circuit simply did not give this principle the weight it deserves. In ruling that groups like SpeechNow.org must become PACs in order to make unlimited independent expenditures, the D.C. Circuit

has ensured that the independent speech of such groups will be chilled. As this Court noted in *Citizens United*, the burden of PAC regulations "might explain why fewer than 2,000 of the millions of corporations in this country have PACs." *Citizens United*, 130 S. Ct. at 897. Supporting the Court's insight, a study of the 2000 election cycle found that PACs spend approximately half of their total revenues on compliance costs and fundraising. *See* Stephen D. Ansolabehere *et al.*, *Why Is There So Little Money in American Politics?*, 17 J. Econ. Persp. 105, 108 (2003). Indeed, during the 2005-2006 election cycle, there were only 1,797 PACs that, like SpeechNow.org, were not affiliated with corporations or unions (otherwise known as "non-connected" PACs). App. 323.

The effect of the D.C. Circuit's ruling is to create yet another distinct regulated entity – the "independent expenditure PAC." Other groups have already begun asking the FEC's permission to operate such PACs, which will prompt "[g]overnment officials [to] pore over each word" of an advisory opinion request to determine whether the speakers may take advantage of the D.C. Circuit's ruling. *Citizens United*, 130 S. Ct. at 896.[6] It is still unclear whether existing

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[6] *See* FEC Advisory Op. Request 2010-09 (Club for Growth), *available at* http://saos.nictusa.com/aodocs/1139699.pdf; FEC Advisory Op. Request 2010-11 (Commonsense Ten), *available at* http://saos.nictusa.com/aodocs/1140639.pdf. The FEC's responses to these requests are available at http://saos.nictusa.com/aodocs/AO%202010-09.pdf and http://saos.nictusa.com/aodocs/AO%202010-11.pdf.

rules will govern these new committees or whether the FEC will issue a new set of rules that apply to them. *See* Amanda Adams, *FEC Will Eventually Consider Guidance for Disclosing Independent Expenditures*, OMB Watch (July 16, 2010), http://www.ombwatch.org/node/11141. What is clear is that many groups will refrain from speaking rather than undertaking the effort to discover how they will be regulated if they speak about politics. *See Citizens United*, 130 S. Ct. at 895-96 (noting that the necessity of filing advisory opinion requests and navigating complicated rules chill speech).

The D.C. Circuit has held, in effect, that although PACs impose too great a burden on corporations that wish to make independent expenditures, the burden is entirely acceptable for small, unincorporated associations of citizens like SpeechNow.org. That result will chill political speech, and cannot be squared with this Court's decision in *Citizens United*.

III. This Case Provides the Court with the Opportunity to Clarify the Scope and Application of the "Major Purpose" Test.

The FEC has long taken the position – and, indeed, argued in this case – that it is constitutionally permissible to require groups like SpeechNow.org to become PACs so long as they have the "major purpose" of "Federal campaign activity" and otherwise meet the definition of political committee. App. 224. Under this test, the FEC conducts a far-reaching

inquiry to determine whether a group's spending on federal campaign activity predominates over its other speech and activities. *See* Supplemental Explanation & Justification, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007).

SpeechNow.org does not dispute that its major purpose is to make independent expenditures, but it does dispute that this purpose answers the question of whether it can be required to become a PAC. Under *Citizens United*, corporations and unions are now entitled to make unlimited independent expenditures without creating PACs. It follows that SpeechNow.org must be treated the same. Absent any threat of corruption – which SpeechNow.org does not present – the government cannot justify requiring it to speak through a PAC.

Although the D.C. Circuit did not rely on Speech Now.org's "major purpose" in upholding the PAC requirements, this case provides the Court with the opportunity to bring much needed clarity to the scope and application of the so-called "major purpose" test. The FEC has relied on an incorrect reading of *Buckley* and *MCFL* – in this case and others – in concluding that "major purpose," rather than a threat of corruption, is the proper constitutional touchstone for determining whether a group can be required to become a PAC in order to speak. *See* 72 Fed. Reg. at 5597. The D.C. Circuit's decision compounded this error by upholding the application of PAC status to SpeechNow.org despite the fact that the group will only make independent expenditures, as corporations

and unions are now entitled to do. The D.C. Circuit's decision thus raises questions as to whether corporations and unions, even after *Citizens United*, will be required to become PACs once they cross the major purpose threshold. Resolving the question presented in this case in SpeechNow.org's favor would bring clarity to the law and would preserve free speech by making clear that *only* groups whose activities pose a threat of corruption need register as PACs.

A. Originally introduced as a shield for political speech, "major purpose" has since become a sword wielded by the government as a regulatory tool.

This Court first used the term "major purpose" in *Buckley*. But it did so not as part of a holding that major purpose was the sole or even primary factor for determining whether a group could constitutionally be required to become a PAC. Instead, the Court used major purpose as a means of demonstrating that the definition of "political committee," like the definitions of other terms in FECA, was appropriately limited to certain types of federal campaign activity in order to avoid problems of vagueness and overbreadth. In short, the purpose of this discussion in *Buckley* was to narrow the definition of political committee to provide a shield for free speech. Major purpose is thus, at most, a necessary condition for the imposition of PAC status, but it is far from constitutionally sufficient in all cases.

The Court's discussion of major purpose in *Buckley* did not arise in the context of a challenge to the definition of political committee at all, because the definition was not challenged in the case. *See* 424 U.S. at 60-61. It arose in the context of a challenge to 2 U.S.C. § 434(e), a disclosure provision that applied to persons, other than political committees, who spent money "for the purpose of influencing" the nomination or election of federal candidates. *See* 424 U.S. at 77. In assessing that challenge, the threshold question was whether the phrase "for the purpose of influencing" rendered § 434(e) vague and overbroad.

In answering that question, the Court took essentially the same approach it had taken with the terms "contribution" and "expenditure" – it sought to determine whether it could construe § 434(e) narrowly and remain "consistent with the legislature's purpose." *Id.* at 78. Thus, the Court first noted that it had construed the definitions of "contribution" and "expenditure" in a manner that reached only activity that was within the core area Congress sought to regulate. *Id.* at 79-80. It then did the same thing with the term "political committee" and noted that lower courts had construed the definition to avoid chilling the speech of advocacy groups. *Id.* at 79 & n.106. As the Court stated, "To fulfill the purposes of the Act ["political committee"] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* at 79. So limited, the expenditures of political committees are "within the core area

sought to be addressed by Congress. They are, by definition, campaign related." *Id.*

Buckley does not support the FEC's view that it is constitutional to apply PAC status to a group so long as it raises or spends in excess of $1,000 and has the major purpose of federal campaign activity. That is so for two reasons. First, the actual language this Court used was far narrower than campaign activity or even express advocacy. It pertained only to groups "under the control of *a* candidate" or whose major purpose is "the nomination or election of *a* candidate." *Id.* (emphasis added). The Court's use of the singular here is significant, for it is consistent with one of the purposes for which FECA was enacted – to prevent the proliferation of committees used by candidates to skirt contribution limits and disclosure provisions. *See id.* at 62 n.71; *see also* Herbert E. Alexander, *Financing Politics: Money, Elections, and Political Reform* 25-26 (4th ed. 1992). As narrowed in *Buckley*, the definition of political committee applies to groups controlled by a candidate or whose purpose is to elect a specific candidate, thereby preventing candidates from using multiple committees to raise funds outside the limits or to avoid disclosure. *Cf. Buckley*, 424 U.S. at 56 ("Extensive reporting, auditing, and disclosure requirements applicable to both contributions and expenditures by political campaigns are designed to facilitate the detection of illegal contributions.").

Second, avoiding vagueness and overbreadth through a narrowing construction does not render a statute constitutional in other respects. *See, e.g.*,

United States v. Thirty-Seven (37) Photographs, 402 U.S. 363, 373 (1971) (stating that courts impose narrowing constructions specifically "to avoid decision of constitutional questions"). The Court's approach to expenditure limits in *Buckley* makes that clear. Even after narrowing the definition of expenditure to cover spending for express advocacy, the Court still applied strict scrutiny and struck the expenditure limits down. *See* 424 U.S. at 43-44, 51.

Buckley's discussion of major purpose thus supports – at most – the proposition that a major purpose of supporting or opposing a candidate is necessary for the imposition of PAC status, but it is not constitutionally sufficient standing alone. Nevertheless, the FEC has long relied on dicta from *MCFL* in which the Court stated, "should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be *classified* as a political committee." 479 U.S. at 262 (emphasis added). As a statutory matter, this statement is a truism that supports, at most, the proposition that a different analysis might apply in the event that MCFL's spending increased. Read in this manner, the *MCFL* dicta is consistent with the Court's understanding in *Buckley* that a limiting construction, such as major purpose, is not the last step in the constitutional analysis, but the first. *See* 424 U.S. at 45-51.

Indeed, the FEC's position is not supported by *MCFL* itself. In *MCFL*, the Court held that the government could not ban a small nonprofit corporation's

independent expenditures or require it to speak through a PAC because the group posed no threat of corruption. 479 U.S. at 263. The Court did not hold that a major purpose of federal campaign activity was a separate and independent constitutional ground for requiring such a group to speak through a PAC. Indeed, the Court could not have done so, because the FEC conceded that MCFL had no such major purpose. *See id.* at 252 n.6. As this Court stated in *McConnell*, "[w]e have long rigidly adhered to the tenet never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, for the nature of judicial review constrains us to consider the case that is actually before us." 540 U.S. at 192 (internal quotation marks and citation omitted).

In sum, the FEC has turned rulings from *Buckley* and *MCFL* that protected speech on their heads. Major purpose, once a shield against overregulation, has become the justification for regulating independent expenditures that this Court has said may not be limited.

B. The "major purpose" test as currently applied is inconsistent with this Court's decisions in *Buckley* and *Citizens United*.

The major purpose test is an invitation to the FEC to conduct a profoundly burdensome inquiry into every aspect of a group's activities. Granting certiorari in this case would allow this Court to

provide clarity to the law and appropriate protection for political speech by ruling that the potential for corruption, not major purpose alone, is the appropriate constitutional touchstone for determining PAC status. Groups such as SpeechNow.org, that make no direct contributions to candidates and that will disclose under § 434(c), cannot be required to become political committees in order to speak.

The major purpose test conflicts with this Court's precedents in three respects.

First, the major purpose test replaces the strict scrutiny that typically applies to laws that burden speech with a case-by-case inquiry that turns on the extent to which a group engages in protected speech. *Compare* 72 Fed. Reg. at 5596-97, 5601-02 *with WRTL II*, 551 U.S. at 478 ("A court applying strict scrutiny must ensure that a compelling interest supports *each application* of a statute restricting speech.") (emphasis in original). The major purpose test requires no demonstration of a compelling interest or narrow tailoring, and essentially places the burden on groups to demonstrate that they have not spent too much money on speech.

Second, in direct conflict with *Citizens United*, *Davis*, and *Buckley*, the major purpose test imposes restrictions on speakers based on the amount of money they spend on speech. As this Court stated in *Citizens United*, the First Amendment's protections do not depend on the speaker's financial ability to engage in public discussion. 130 S. Ct. at 904; *see also*

Davis, 128 S. Ct. at 2773-74; *Buckley*, 424 U.S. at 49. The major purpose test violates this principle in a particularly perverse manner, by making it far more likely that smaller groups that make independent expenditures will be forced to become PACs than larger groups.

For example, General Motors could spend millions on independent expenditures without ever coming close to having the major purpose of electoral advocacy. SpeechNow.org or a similar group will cross the major purpose threshold with expenditures that are only a tiny fraction of that amount. The result is a de facto burden based on the identity of the speaker in that small, ideological groups will virtually always be required to become PACs, while large business corporations will almost never be required to do so. *Cf. Citizens United*, 130 S. Ct. at 905 ("The rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity"); *id.* at 907-08 (noting that prohibition on corporate speech fell hardest on small corporations).

Third, the major purpose test requires precisely the sort of "intricate case-by-case determinations" that the Court refused to allow in *Citizens United*. *Id.* at 892. As the FEC has admitted, "[a]pplying the major purpose doctrine . . . requires the flexibility of a case-by-case analysis of an organization's conduct that is incompatible with a one-size-fits-all rule." 72 Fed. Reg. at 5601. To determine a group's major

purpose, the FEC conducts a "fact-intensive analysis of a group's campaign activities compared to its activities unrelated to campaigns." *Id.* This analysis looks to "public statements" and other conduct going "well beyond publicly available advertisements." *Id.* It examines "the form and nature" of a group's statements as well as "the speaker's position within the organization" and how the group "characterize[s] its activities and purposes." *Id.* It may focus on federal or nonfederal spending, "fundraising appeals," "fundraising solicitations," the "sources of [a group's] contributions," and the full range of its activities. *Id.* at 5604-05.

The FEC has refused to issue rules governing the major purpose inquiry because of "the flexibility needed to apply the major purpose doctrine appropriately." *Id.* at 5602. Even a "list of factors" to be considered would be inappropriate, according to the FEC, because it would not be "exhaustive" enough "as evidenced by the multitude of fact patterns at issue in the Commission's enforcement matters." *Id.* at 5602. If an organization wants guidance on how to apply the major purpose test, according to the FEC, it can "look to the public files for the Political Committee Status Matters and other closed enforcement matters, as well as advisory opinions and filings in civil enforcement cases." *Id.* at 5604.

This epitomizes the process that this Court decried in *Citizens United* when it stated that the "the FEC has created a regime that allows it to select what political speech is safe for public consumption

by applying ambiguous tests." 130 S. Ct. at 896; *see also WRTL II*, 551 U.S. at 469-77. If parties wish to avoid litigation or fines under this process "they must either refrain from speaking or ask the FEC to issue an advisory opinion approving of the political speech in question" which invites officials to scrutinize their speech-related activities. *Citizens United*, 130 S. Ct. at 896. "This is an unprecedented government intervention into the realm of speech." *Id.*; *see also id.* at 889 ("The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day"). In *Citizens United*, this Court recognized that "onerous restrictions [can] function as the equivalent of prior restraint by giving the FEC power analogous to licensing laws." *Id.* at 895-96. The major purpose inquiry gives the FEC – whose "business is to censor," *id.* at 896 – precisely this sort of power.

Granting certiorari in this case would give this Court the opportunity to clarify that groups, like SpeechNow.org, do not have to endure this burdensome process in order to speak.

CONCLUSION

For the reasons stated above, the Court should grant certiorari.

Respectfully submitted,

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 27, 2010 Decided March 26, 2010

No. 08-5223

SPEECHNOW.ORG, ET AL.,
APPELLANTS

v.

FEDERAL ELECTION COMMISSION,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:08-cv-00248-JR)

No. 09-5342

DAVID KEATING, ET AL.,
APPELLANTS

v.

FEDERAL ELECTION COMMISSION,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:08-cv-00248-JR)

Steven M. Simpson argued the cause for appellants. With him on the brief were William H.

Mellor, Robert W. Gall, Robert P. Frommer, Paul M. Sherman, and Stephen M. Hoersting.

Heidi K. Abegg and Alan P. Dye were on the briefs for *amici curiae* Alliance for Justice, et al. in support of appellants.

David B. Kolker, Associate General Counsel, Federal Election Commission, argued the cause for appellee. With him on the briefs was Vivien Clair, Attorney.

Joseph G. Hebert, Donald J. Simon, Scott L. Nelson, Fred Wertheimer were on the briefs for *amici curiae* Campaign Legal Center and Democracy 21.

Howard R. Rubin was on the briefs for *amici curiae* The Brennan Center for Justice and Professor Richard Briffault in support of appellee.

Before: SENTELLE, Chief Judge, GINSBURG, HENDERSON, ROGERS, TATEL, GARLAND, BROWN, GRIFFITH, and KAVANAUGH, Circuit Judges.

Opinion for the Court filed by Chief Judge SENTELLE.

SENTELLE, Chief Judge: David Keating is president of an unincorporated nonprofit association, SpeechNow.org (SpeechNow), that intends to engage in express advocacy[1] supporting candidates for federal

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[1] "Express advocacy" is regulated more strictly by the FEC than so-called "issue ads" or other political advocacy that is not related to a specific campaign. In order to preserve the FEC's

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office who share his views on First Amendment rights of free speech and freedom to assemble. In January 2008, the Federal Election Committee (FEC) issued a draft advisory opinion concluding that under the Federal Election Campaign Act (FECA), SpeechNow would be required to organize as a "political committee" as defined by 2 U.S.C. § 431(4) and would be subject to all the requirements and restrictions concomitant with that designation. Keating and four other individuals availed themselves of 2 U.S.C. § 437h, under which an individual may seek declaratory judgment to construe the constitutionality of any provision of FECA. As required by that provision, the district court certified the constitutional questions directly to this court for en banc determination. Thereafter, the Supreme Court decided *Citizens United v. FEC,* 130 S. Ct. 876 (2010), which resolves this appeal. In accordance with that decision, we hold that the contribution limits of 2 U.S.C. § 441a(a)(1)(C) and 441a(a)(3) are unconstitutional as applied to individuals' contributions to SpeechNow. However, we also hold that the reporting requirements of 2 U.S.C. §§ 432, 433, and 434(a) and the organizational requirements of 2 U.S.C. § 431(4) and 431(8) can constitutionally be applied to SpeechNow. In this

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regulations from invalidation for being too vague, the Supreme Court has defined express advocacy as "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Buckley v. Valeo,* 424 U.S. 1, 44 n.52 (1976).

action the district court also denied the plaintiffs' motion to enjoin FEC enforcement of FECA's contribution limits against SpeechNow. Because we hold that those provisions cannot be constitutionally applied, we vacate the order denying that injunction and remand the matter to the district court for further proceedings consistent with our decision.

I. Background

SpeechNow is an unincorporated nonprofit association registered as a "political organization" under § 527 of the Internal Revenue Code. Its purpose is to promote the First Amendment rights of free speech and freedom to assemble by expressly advocating for federal candidates whom it views as supporting those rights and against those whom it sees as insufficiently committed to those rights. It intends to acquire funds solely through donations by individuals. SpeechNow further intends to operate exclusively through "independent expenditures." FECA defines "independent expenditures" as expenditures "expressly advocating the election or defeat of a clearly identified candidate" that are "not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." 2 U.S.C. § 431(17). SpeechNow has five members, two of whom are plaintiffs in this case: David Keating, who is also SpeechNow's president and treasurer, and Edward Crane. Keating makes the operational decisions for

SpeechNow, including in which election campaigns to run advertisements, which candidates to support or oppose, and all administrative decisions.

Though it has not yet begun operations, SpeechNow has made plans both for fundraising and for making independent expenditures. All five of the individual plaintiffs – Keating, Crane, Fred Young, Brad Russo, and Scott Burkhardt – are prepared to donate to SpeechNow. Keating proposes to donate $5500. Crane proposes to donate $6000. Young, who is otherwise unaffiliated with SpeechNow, proposes to donate $110,000. Russo and Burkhardt want to make donations of $100 each. In addition, as of August 2008, seventy-five other individuals had indicated on SpeechNow's website that they were interested in making donations. As for expenditures, SpeechNow planned ads for the 2008 election cycle against two incumbent candidates for federal office who, in the opinion of SpeechNow, did not sufficiently support First Amendment rights. These ads would have cost around $12,000 to produce. Keating intended to place the ads so that the target audience would view the ads at least ten times, which would have cost around $400,000. As SpeechNow never accepted any donations, it never produced or ran these ads. However, SpeechNow intends to run similar ads for the 2010 election cycle if it is not subject to the contribution limits of § 441a(a) at issue in this case.

On November 19, 2007, SpeechNow filed with the FEC a request for an advisory opinion, asking whether it must register as a political committee and

if donations to SpeechNow qualify as "contributions" limited by § 441a(a)(1)(C) and 441a(a)(3). At the time, the FEC did not have enough commissioners to issue an opinion, but it did issue a draft advisory opinion stating that SpeechNow would be a political committee and contributions to it would be subject to the political committee contribution limits. Believing that subjecting SpeechNow to all the restrictions imposed on political committees would be unconstitutional, SpeechNow and the five individual plaintiffs filed a complaint in the district court requesting declaratory relief against the FEC under 2 U.S.C. § 437h. Because § 437h allows only the FEC, political parties, or individuals the right to bring such actions, this court removed SpeechNow from the § 437h proceedings. SpeechNow remains in the caption for this case because it, along with the individual plaintiffs, also sought a preliminary injunction prohibiting the FEC from enforcing the political committee contribution limits with respect to contributions to SpeechNow, and the denial of that injunction is also on appeal before this court. Because this court was already scheduled to hear the constitutional issues en banc, we consolidated the appeal with the en banc proceeding.

Section 437h provides that a "district court immediately shall certify all questions of constitutionality of this Act [FECA] to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc." The district court made

findings of fact, and certified to this court five questions:

> 1. Whether the contribution limits contained in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3) violate the First Amendment by preventing David Keating, SpeechNow.org's president and treasurer, from accepting contributions to SpeechNow.org in excess of the limits contained in §§ 441a(a)(1)(C) and 441a(a)(3).
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> 2. Whether the contribution limit mandated by 2 U.S.C. § 441a(a)(1)(C) violates the First Amendment by preventing the individual plaintiffs from making contributions to SpeechNow.org in excess of $5000 per calendar year.
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> 3. Whether the biennial aggregate contribution limit mandated by 2 U.S.C. § 441a(a)(3) violates the First Amendment by preventing Fred Young from making contributions to SpeechNow.org that would exceed his individual biennial aggregate limit.
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> 4. Whether the organizational, administrative, and continuous reporting requirements set forth in 2 U.S.C. §§ 432, 433, and 434(a) violate the First Amendment by requiring David Keating, SpeechNow.org's president and treasurer, to register SpeechNow.org as a political committee, to adopt the organizational structure of a political committee, and to comply with the continuous

reporting requirements that apply to political committees.

5. Whether 2 U.S.C. §§ 431(4) and 431(8) violate the First Amendment by requiring David Keating, SpeechNow.org's president and treasurer, to register SpeechNow.org as a political committee and comply with the organizational and continuous reporting requirements for political committees before SpeechNow.org has made any expenditures or broadcast any advertisements.

SpeechNow.org v. FEC, No. 08-0248 (D.D.C. Sept. 28, 2009).

Under FECA, a political committee is "any committee, club, association, or other group of persons" that receives contributions of more than $1000 in a year or makes expenditures of more than $1000 in a year. 2 U.S.C. § 431(4). Once a group is so designated, contributions to the committee are restricted by 2 U.S.C. § 441a(a)(1)(C) and 441a(a)(3). The first provision limits an individual's contribution to a political committee to $5000 per calendar year; the second limits an individual's total contributions to all political committees to $69,900 biennially.[2] *See* Price

[2] Subject to exceptions not here relevant, FECA defines "contributions" as "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). Again subject to exceptions, the Act defines "expenditure" as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by

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Index Increases for Contribution and Expenditure Limitations, 74 Fed. Reg. 7437 (Feb. 17, 2009) (increasing § 441a(a)(3)(B)'s limit from $57,500 to $69,900). A political committee also must comply with all applicable recordkeeping and reporting requirements of 2 U.S.C. §§ 432, 433, and 434(a). Under those sections, if the FEC regulates SpeechNow as a political committee, SpeechNow would be required to, among other things: appoint a treasurer, § 432(a); maintain a separately designated bank account, § 432(b), 432(h); keep records for three years that include the name and address of any person who makes a contribution in excess of $50, § 432(c)(1)-(2), 432(d); keep records for three years that include the date, amount, and purpose of any disbursement and the name and address of the recipient, § 432(c)(5), 432(d); register with the FEC within ten days of becoming a political committee, § 433(a); file with the FEC quarterly or monthly reports during the calendar year of a general election detailing cash on hand, total contributions, the identification of each person who contributes an annual aggregate amount of more than $200, independent expenditures, donations to other political committees, any other disbursements, and any outstanding debts or obligations, § 434(a)(4), 434(b); file a pre-election report and a post-election report detailing the same, *id.*; file

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any person for the purpose of influencing any election for Federal office; and [ ] a written contract, promise, or agreement to make an expenditure." 2 U.S.C. § 431(9)(A)(i)-(ii).

semiannual or monthly reports with the same information during years without a general election, *id.*; and file a written statement in order to terminate the committee, § 433(d).

II. Analysis

A. *Contribution Limits (Certified Questions 1-3)*

The First Amendment mandates that "Congress shall make no law . . . abridging the freedom of speech." In *Buckley v. Valeo,* 424 U.S. 1 (1976), the Supreme Court held that, although contribution limits do encroach upon First Amendment interests, they do not encroach upon First Amendment interests to as great a degree as expenditure limits. In *Buckley,* the Supreme Court first delineated the differing treatments afforded contribution and expenditure limits. In that case, the Court struck down limits on an individual's expenditures for political advocacy, but upheld limits on contributions to political candidates and campaigns. In making the distinction, the Court emphasized that in "contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication." *Id.* at 20-21. However, contribution limits still do implicate fundamental First Amendment interests. *Id.* at 23.

When the government attempts to regulate the financing of political campaigns and express advocacy through contribution limits, therefore, it must have a countervailing interest that outweighs the limit's burden on the exercise of First Amendment rights. Thus a "contribution limit involving significant interference with associational rights must be closely drawn to serve a sufficiently important interest." *Davis v. FEC,* 128 S. Ct. 2759, 2772 n.7 (2008) (quoting *McConnell v. FEC,* 540 U.S. 93, 136 (2003)) (internal quotation marks omitted). The Supreme Court has recognized only one interest sufficiently important to outweigh the First Amendment interests implicated by contributions for political speech: preventing corruption or the appearance of corruption. *Id.* at 2773; *FEC v. Nat'l Conservative Political Action Comm.,* 470 U.S. 480, 496-97 (1985) ("*NCPAC*"). The Court has rejected each of the few other interests the government has, at one point or another, suggested as a justification for contribution or expenditure limits. Equalization of differing viewpoints is not a legitimate government objective. *Davis,* 128 S. Ct. at 2773. An informational interest in "identifying the sources of support for and opposition to" a political position or candidate is not enough to justify the First Amendment burden. *Citizens Against Rent Control v. City of Berkeley,* 454 U.S. 290, 298 (1981). And, though this rationale would not affect an unincorporated association such as SpeechNow, the Court has also refused to find a sufficiently compelling governmental interest in preventing "the corrosive and distorting effects of immense

aggregations of wealth that are accumulated with the help of the corporate form." *Citizens United v. FEC,* 130 S. Ct. 876, 902, 905 (2010) (quoting *Austin v. Mich. Chamber of Commerce,* 494 U.S. 652, 660 (1990), and rejecting *Austin*'s and subsequent cases' reliance on that interest).

Given this precedent, the only interest we may evaluate to determine whether the government can justify contribution limits as applied to SpeechNow is the government's anticorruption interest. Because of the Supreme Court's recent decision in *Citizens United v. FEC,* the analysis is straightforward. There, the Court held that the government has *no* anti-corruption interest in limiting independent expenditures.[3]

Citizens United involved a nonprofit corporation that in January 2008 produced a film that was highly critical of then-Senator Hillary Clinton, a candidate in the Democratic Party's 2008 Presidential primary elections. The film was, "in essence, . . . a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President." *Citizens United,* 130 S. Ct. at 890. As such, the film was subject to the restrictions of 2 U.S.C. § 441b. That provision made it unlawful for any corporation or union to use general treasury funds to make

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[3] Of course, the government still has an interest in preventing *quid pro quo* corruption. However, after *Citizens United,* independent expenditures do not implicate that interest.

independent expenditures as defined by 2 U.S.C. § 431(17) or expenditures for speech defined as "electioneering communications," which are certain types of political ads aired shortly before an election or primary, 2 U.S.C. § 434(f)(3). The Supreme Court declared this expenditure ban unconstitutional, holding that corporations may not be prohibited from spending money for express political advocacy when those expenditures are independent from candidates and uncoordinated with their campaigns. 130 S. Ct. at 913.

The independence of independent expenditures was a central consideration in the Court's decision. By definition, independent expenditures are "not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." 2 U.S.C. § 431(17). As the *Buckley* Court explained when it struck down a limit on independent expenditures, "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Citizens United,* 130 S. Ct. at 908 (quoting *Buckley,* 424 U.S. at 47). However, the *Buckley* Court left open the possibility that the future might bring data linking independent expenditures to corruption or the appearance of corruption. The Court merely concluded that independent expenditures "do [] not presently appear to pose dangers of real or apparent

corruption comparable to those identified with large campaign contributions." 424 U.S. at 46.

Over the next several decades, Congress and the Court gave little further guidance respecting *Buckley*'s reasoning that a lack of coordination diminishes the possibility of corruption. Just a few months after *Buckley,* Congress codified a ban on corporations' independent expenditures at 2 U.S.C. § 441b. In 1978, in *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978), the Court "struck down a state-law prohibition on corporate independent expenditures related to referenda," but did not "address the constitutionality of the State's ban on corporate independent expenditures to support candidates." *Citizens United,* 130 S. Ct. at 902, 903. Though the *Bellotti* Court sweepingly rejected "the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation," 435 U.S. at 784, it limited the implications of that rejection by opining in a footnote that "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections," 435 U.S. at 788 n.26. Then, in *Austin,* the Court expressly upheld a Michigan law that prohibited corporate independent expenditures. 494 U.S. at 654-55. And in *McConnell,* the Court relied on *Austin* to uphold the Bipartisan Campaign Reform Act of 2002's (BCRA's) extension of § 441b's ban on

corporate expenditures to electioneering communications. 540 U.S. at 203-09.

The *Citizens United* Court reevaluated this line of cases and found them to be incompatible with *Buckley*'s original reasoning. The Court overruled *Austin* and the part of *McConnell* that upheld BCRA's amendments to § 441b. More important for this case, the Court did so by expressly deciding the question left open by the footnoted caveat in *Bellotti*. The Court stated, "[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." *Citizens United,* 130 S. Ct. at 909.

The Court came to this conclusion by looking to the definition of corruption and the appearance of corruption. For several decades after *Buckley,* the Court's analysis of the government's anti-corruption interest revolved largely around the "hallmark of corruption," "financial *quid pro quo*: dollars for political favors," *NCPAC,* 470 U.S. at 497. However, in a series of cases culminating in *McConnell,* the Court expanded the definition to include "the appearance of undue influence" created by large donations given for the purpose of "buying access," 540 U.S. at 144, 148. *See also FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001); *Nixon v. Shrink Mo. Gov't PAC,* 528 U.S. 377, 389 (2000). The *McConnell* Court concluded that limiting the government's anticorruption interest to preventing *quid pro quo* was a "crabbed view of corruption, and particularly of the appearance of

corruption" that "ignores precedent, common sense, and the realities of political fundraising." 540 U.S. at 152. The *Citizens United* Court retracted this view of the government's interest, saying that "[t]he fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt." 130 S. Ct. at 910. The Court returned to its older definition of corruption that focused on *quid pro quo,* saying that "[i]ngratiation and access . . . are not corruption." *Id.* Therefore, without any evidence that independent expenditures "lead to, or create the appearance of, *quid pro quo* corruption," and only "scant evidence" that they even ingratiate, *id.*, the Court concluded that independent expenditures do not corrupt or create the appearance of corruption.

In its briefs in this case, the FEC relied heavily on *McConnell,* arguing that independent expenditures by groups like SpeechNow benefit candidates and that those candidates are accordingly grateful to the groups and to their donors. The FEC's argument was that large contributions to independent expenditure groups "lead to preferential access for donors and undue influence over officeholders." Appellee's Br. in *Keating v. FEC,* at 16. Whatever the merits of those arguments before *Citizens United,* they plainly have no merit after *Citizens United.*

In light of the Court's holding as a matter of law that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the

appearance of corruption. The Court has effectively held that there is no corrupting "quid" for which a candidate might in exchange offer a corrupt "quo."

Given this analysis from *Citizens United*, we must conclude that the government has no anti-corruption interest in limiting contributions to an independent expenditure group such as SpeechNow. This simplifies the task of weighing the First Amendment interests implicated by contributions to SpeechNow against the government's interest in limiting such contributions. As we have observed in other contexts, "something . . . outweighs nothing every time." *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989). Thus, we do not need to quantify to what extent contributions to SpeechNow are an expression of core political speech. We do not need to answer whether giving money is speech per se, or if contributions are merely symbolic expressions of general support, or if it matters in this case that just one person, David Keating, decides what the group will say. All that matters is that the First Amendment cannot be encroached upon for naught.

At oral argument, the FEC insisted that *Citizens United* does not disrupt *Buckley*'s longstanding decision upholding contribution limits. This is literally true. But, as *Citizens United* emphasized, the limits upheld in *Buckley* were limits on contributions made *directly to candidates*. Limits on direct contributions to candidates, "unlike limits on independent expenditures, have been an accepted means to

prevent *quid pro quo* corruption." *Citizens United*, 130 S. Ct. at 909 (citing *McConnell*, 540 U.S. at 136-38 & n.40).

The FEC also argues that we must look to the discussion about the potential for independent expenditures to corrupt in *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996). This, too, is unavailing. In *Colorado Republican*, the Court considered the constitutionality of FECA provisions that exempted political party committees from the general political committee contribution limits, but imposed limitations on political party committees' independent expenditures. *Id.* at 611-13. A majority of the Court agreed that the independent expenditure limitations were unconstitutional, but no more than three Justices joined any single opinion. It is true that the opinion of Justice Breyer did discuss the potential for corruption or the appearance of corruption potentially arising from independent expenditures, saying that "[t]he greatest danger of corruption . . . appears to be from the ability of donors to give sums up to $20,000 to a party which may be used for independent party expenditures for the benefit of a particular candidate," thus evading the limits on direct contributions to candidates. *Id.* at 617 (opinion of Breyer, J.). But *Colorado Republican* concerned expenditures by political parties, which are wholly distinct from "independent expenditures" as defined by 2 U.S.C. § 431(17). Moreover, a discussion in a 1996 opinion joined by only three Justices cannot control our analysis when the more recent opinion of

the Court in *Citizens United* clearly states as a matter of law that independent expenditures do not pose a danger of corruption or the appearance of corruption.

The FEC argues that the analysis of *Citizens United* does not apply because that case involved an expenditure limit while this case involves a contribution limit. [Oral Tr. at 30, 31.] Alluding to the divide between expenditure limits and contribution limits established by *Buckley*, the FEC insists that contribution limits are subject to a lower standard of review than expenditure limits, so that "what may be insufficient to justify an expenditure limit may be sufficient to justify a contribution limit." Oral Arg. Tr. at 39. Plaintiffs, on the other hand, argue that *Citizens United* stands for the proposition that "burdensome laws trigger strict scrutiny." Oral Arg. Tr. at 58. We do not find it necessary to decide whether the logic of *Citizens United* has any effect on the standard of review generally afforded contribution limits. The *Citizens United* Court avoided "reconsider[ing] whether contribution limits should be subjected to rigorous First Amendment scrutiny," 130 S. Ct. at 909, and so do we. Instead, we return to what we have said before: because *Citizens United* holds that independent expenditures do not corrupt or give the appearance of corruption as a matter of law, then the government can have no anti-corruption interest in limiting contributions to independent expenditure – only organizations. No matter which

standard of review governs contribution limits, the limits on contributions to SpeechNow cannot stand.

We therefore answer in the affirmative each of the first three questions certified to this Court. The contribution limits of 2 U.S.C. § 441a(a)(1)(C) and 441a(a)(3) violate the First Amendment by preventing plaintiffs from donating to SpeechNow in excess of the limits and by prohibiting SpeechNow from accepting donations in excess of the limits. We should be clear, however, that we only decide these questions as applied to contributions to SpeechNow, an independent expenditure – only group. Our holding does not affect, for example, § 441a(a)(3)'s limits on direct contributions to candidates.

B. *Organizational and Reporting Requirements (Certified Questions 4 & 5)*

Disclosure requirements also burden First Amendment interests because "compelled disclosure, in itself, can seriously infringe on privacy of association and belief." *Buckley,* 424 U.S. at 64. However, in contrast with limiting a person's ability to spend money on political speech, disclosure requirements "impose no ceiling on campaign-related activities," *id.,* and "do not prevent anyone from speaking," *McConnell,* 540 U.S. at 201 (internal quotation marks and alteration omitted). Because disclosure requirements inhibit speech less than do contribution and expenditure limits, the Supreme Court has not limited the government's acceptable interests to

anti-corruption alone. Instead, the government may point to any "sufficiently important" governmental interest that bears a "substantial relation" to the disclosure requirement. *Citizens United,* 130 S. Ct. at 914 (quoting *Buckley,* 424 U.S. at 64, 66, and citing *McConnell,* 540 U.S. at 231-32). Indeed, the Court has approvingly noted that "disclosure is a less restrictive alternative to more comprehensive regulations of speech." *Citizens United,* 130 S. Ct. at 915 (citing *FEC v. Mass. Citizens for Life, Inc.,* 479 U.S. 238, 262 (1986)).

The Supreme Court has consistently upheld organizational and reporting requirements against facial challenges. In *Buckley,* the Court upheld FECA's disclosure requirements, including the requirements of §§ 432, 433, and 434(a) at issue here, based on a governmental interest in "provid[ing] the electorate with information" about the sources of political campaign funds, not just the interest in deterring corruption and enforcing anti-corruption measures. 424 U.S. at 66. In *McConnell,* the Court upheld similar requirements for organizations engaging in electioneering communications for the same reasons. 540 U.S. at 196. *Citizens United* upheld disclaimer and disclosure requirements for electioneering communications as applied to Citizens United, again citing the government's interest in providing the electorate with information. 130 S. Ct. at 913-14. And while the Court in *Davis v. FEC* found that a certain disclosure requirement violated the First Amendment, it only did so because that

disclosure triggered the application of an unconstitutional provision which imposed asymmetrical contribution limits on candidates based on how much of their personal funds they planned to spend. Because the asymmetrical limits were unconstitutional, there was no justification for the disclosure requirement. 128 S. Ct. at 2775.

Plaintiffs do not disagree that the government may constitutionally impose reporting requirements, and SpeechNow intends to comply with the disclosure requirements that would apply even if it were not a political committee. *See* 2 U.S.C. § 434(c) (reporting requirements for individuals or groups that are not political committees that make independent expenditures); § 441d (disclaimer requirements for independent expenditures and electioneering communications). Instead, plaintiffs argue that the additional burden that would be imposed on SpeechNow if it were required to comply with the organizational and reporting requirements applicable to political committees is too much for the First Amendment to bear. We disagree.

SpeechNow, as we have said, intends to comply with the disclosure requirements applicable to those who make independent expenditures but are not organized as political committees. Those disclosure requirements include, for example, reporting much of the same data on contributors that is required of political committees, 2 U.S.C. § 434(c); information about each independent expenditure, such as which candidate the expenditure supports or opposes, *id.*;

reporting within 24 hours expenditures of $1000 or more made in the twenty days before an election, § 434(g)(1); and reporting within 48 hours any expenditures or contracts for expenditures of $10,000 or more made at any other time, § 434(g)(2).

Because SpeechNow intends only to make independent expenditures, the additional reporting requirements that the FEC would impose on SpeechNow if it were a political committee are minimal. Indeed, at oral argument, plaintiffs conceded that "the reporting is not really going to impose an additional burden" on SpeechNow. Oral Arg. Tr. at 14 ("Judge Sentelle: So, just calling you a [PAC] and not making you do anything except the reporting is not really going to impose an additional burden on you right? . . . Mr. Simpson: I think that's true. Yes."). Nor do the organizational requirements that SpeechNow protests, such as designating a treasurer and retaining records, impose much of an additional burden upon SpeechNow, especially given the relative simplicity with which SpeechNow intends to operate.

Neither can SpeechNow claim to be burdened by the requirement to organize as a political committee as soon as it receives $1000, as required by the definition of "political committee," 2 U.S.C. § 431(4), 431(8), rather than waiting until it expends $1000. Plaintiffs argue that such a requirement forces SpeechNow to comply with the burdens of political committees without knowing if it is going to have enough money to make its independent expenditures. This is a specious interpretation of the facts before

us. As the district court found, SpeechNow already has $121,700 in planned contributions from plaintiffs alone, with dozens more individuals claiming to want to donate. SpeechNow can hardly compare itself to "ad hoc groups that want to create themselves on the spur of the moment," as plaintiffs attempted at oral argument. Oral Arg. Tr. at 17. In addition, plaintiffs concede that in practice the burden is substantially the same to *any* group whether the FEC imposes reporting requirements at the point of the money's receipt or at the point of its expenditure. Oral Arg. Tr. at 15-16. A group raising money for political speech will, we presume, always hope to raise enough to make it worthwhile to spend it. Therefore, groups would need to collect and keep the necessary data on contributions even before an expenditure is made; it makes little difference to the burden of compliance *when* the group must comply as long as it anticipates complying at some point.

We cannot hold that the organizational and reporting requirements are unconstitutional. If SpeechNow were not a political committee, it would not have to report contributions made exclusively for administrative expenses. *See* 2 U.S.C. § 434(c)(2)(C) (requiring only the reporting of contributions "made for the purpose of furthering an independent expenditure"). But the public has an interest in knowing who is speaking about a candidate and who is funding that speech, no matter whether the contributions were made towards administrative expenses or independent expenditures. Further,

requiring disclosure of such information deters and helps expose violations of other campaign finance restrictions, such as those barring contributions from foreign corporations or individuals. These are sufficiently important governmental interests to justify requiring SpeechNow to organize and report to the FEC as a political committee.

We therefore answer the last two certified questions in the negative. The FEC may constitutionally require SpeechNow to comply with 2 U.S.C. §§ 432, 433, and 434(a), and it may require SpeechNow to start complying with those requirements as soon as it becomes a political committee under the current definition of § 431(4).

Conclusion

We conclude that the contribution limits set forth in certified questions 1, 2, and 3 cannot be constitutionally applied against SpeechNow and the individual plaintiffs. We further conclude that there is no constitutional infirmity in the application of the organizational, administrative, and reporting requirements set forth in certified questions 4 and 5. We further conclude that because of our decision today, as guided by *Citizens United,* which intervened since the entry of the district court's denial of plaintiffs' petition for injunctive relief, the district court's order

denying injunctive relief is vacated and remanded for further proceedings consistent with our decision.

So ordered.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5223 **September Term, 2009**
FILED ON: MARCH 26, 2010

SPEECHNOW.ORG, ET AL.,
APPELLANTS

v.

FEDERAL ELECTION COMMISSION,
APPELLEE

Consolidated with No. 09-5342

Appeals from the United States District Court
for the District of Columbia
(No. 1:08-cv-00248-JR)

Before: SENTELLE, *Chief Judge*, GINSBURG, HENDERSON, ROGERS, TATEL, GARLAND, BROWN, GRIFFITH, and KAVANAUGH, *Circuit Judges*.

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the contribution limits set forth in certified questions 1, 2, and 3 cannot be constitutionally applied against

SpeechNow and the individual plaintiffs; and there is no constitutional infirmity in the application of the organizational, administrative, and reporting requirements set forth in certified questions 4 and 5. It is

FURTHER ORDERED and **ADJUDGED** that the District Court's order denying injunctive relief be vacated and the case be remanded for further proceedings, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

Date: March 26, 2010

Opinion for the court filed by Chief Judge Sentelle.

A True copy:

United States Court of Appeals
for the District of Columbia Circuit

By: /s/ Michael C. McGrail Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SPEECHNOW.ORG, DAVID KEATING, FRED M. YOUNG, JR., EDWARD H. CRANE, III, BRAD RUSSO, and SCOTT BURKHARDT **Plaintiffs,** **v.** **FEDERAL ELECTION COMMISSION,** **Defendant.**	**Civil Case No. 1:08-cv-00248 (JR)** **(Filed May 27, 2010)**

ORDER GRANTING PLAINTIFFS' MOTION FOR ENTRY OF JUDGMENT

The D.C. Circuit, in its opinion of March 26, 2010, held that the statutes and regulations that limit the contributions the individual Plaintiffs may make to SpeechNow.org, and the contributions SpeechNow.org may accept, violate the First Amendment. Accordingly, this Court enters final judgment on behalf of Plaintiffs and declares that the contribution limits set forth in certified questions 1, 2, and 3 (2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3)) and

any implementing regulations cannot be constitutionally applied against SpeechNow.org, the individual Plaintiffs, and others who wish to contribute to SpeechNow.org;

This Court also ORDERS that Defendant is permanently enjoined from enforcing the contribution limits set forth in certified questions 1, 2, and 3 (2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3)) and any implementing regulations against SpeechNow.org, the individual Plaintiffs, and others who wish to contribute to SpeechNow.org.

SO ORDERED this 26th day of May, 2010.

/s/ James Robertson
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SPEECHNOW.ORG, *et al.*,	:	Civil Action
Plaintiffs,	:	No. 08-0248 (JR)
v.	:	
FEDERAL ELECTION COMMISSION,	:	
Defendant.	:	

MEMORANDUM AND FINDINGS

The plaintiffs filed a complaint and a motion for a preliminary injunction in February 2008, asserting that it was unconstitutional for the FEC to apply its contribution limit rules to a group such as Speechnow. Speechnow's business is so-called "independent expenditures": advertisements that advocate the election or defeat of particular candidates, but are not coordinated with any candidates or campaigns. Because these advertisements have the purpose of promoting candidates, and because Speechnow proposes to collect more that $1000 per year, the FEC would regulate Speechnow as a political committee, and place various limits on the contributions Speechnow could receive.

In July 2008, I issued an order denying plaintiffs' motion for a preliminary injunction. Dkt. 32. I found that the contribution limits on independent expenditure groups supported a substantial state interest, and that the plaintiffs were unlikely to succeed on the

merits. Plaintiffs appealed, but simultaneously pursued the unique procedure set forth in 2 U.S.C. § 437h, under which the constitutional questions presented would be certified to the en banc Court of Appeals, following discovery and findings of fact. After I agreed to certify five such questions, plaintiffs held their appeal in abeyance.

The task before me is not to answer any constitutional questions, or to render a judgment of any kind. Instead, I am to make findings of fact that will allow the Court of Appeals to answer the constitutional questions I certify.

The parties submitted several hundred proposed findings of fact, accompanied by thousands of pages of studies, reports, articles, and expert declarations. Most of the proposed findings, and nearly all of the supporting material, centered on the question of whether or not the challenged provisions are necessary to ward off corruption – or the appearance of corruption – in federal elections. To my mind, the facts needed to answer that question are the kind of "facts" that legislatures find. They are not the kind of facts that can be determined in a judicial forum on the basis of a cold paper record full of hearsay and opinion. Accordingly, I directed the parties jointly to submit a set of proposed findings that focused on three questions: (1) How is SpeechNow organized, and how are the individual plaintiffs involved with it? (2) What are SpeechNow's plans? and (3) How do the challenged provisions affect SpeechNow's plans? The findings provided below draw from that document.

They are essentially those findings on which the parties agree, and are the kinds of facts (and conclusions of law, *see, e.g.*, ¶¶ 51-54) that are typically resolved in a judicial forum.

Questions for Appeal

1. Whether the contribution limits contained in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3) violate the First Amendment by preventing David Keating, SpeechNow.org's president and treasurer, from accepting contributions to SpeechNow.org in excess of the limits contained in §§ 441a(a)(1)(C) and 441a(a)(3).

2. Whether the contribution limit mandated by 2 U.S.C. § 441a(a)(1)(C) violates the First Amendment by preventing the individual plaintiffs from making contributions to SpeechNow.org in excess of $5000 per calendar year.

3. Whether the biennial aggregate contribution limit mandated by 2 U.S.C. § 441a(a)(3) violates the First Amendment by preventing Fred Young from making contributions to SpeechNow.org that would exceed his individual biennial aggregate limit.

4. Whether the organizational, administrative, and continuous reporting requirements set forth in 2 U.S.C. §§ 432, 433, and 434(a) violate the First Amendment by requiring David Keating, SpeechNow.org's president and treasurer, to register SpeechNow.org as a political committee, to adopt the

organizational structure of a political committee, and to comply with the continuous reporting requirements that apply to political committees.

5. Whether 2 U.S.C. §§ 431(4) and 431(8) violate the First Amendment by requiring David Keating, SpeechNow.org's president and treasurer, to register SpeechNow.org as a political committee and comply with the organizational and continuous reporting requirements for political committees before SpeechNow.org has made any expenditures or broadcast any advertisements.

Findings of Fact

I. The structure of SpeechNow.org and the involvement of the individual plaintiffs

A. SpeechNow.org

1. SpeechNow.org ("SpeechNow") is an unincorporated nonprofit association organized under the District of Columbia Uniform Unincorporated Nonprofit Associations Act, D.C. Code § 29-971.01 *et seq.*, and registered as a "political organization" under section 527 of the Internal Revenue Code. Keating Decl., Ex. G, SpeechNow.org Internal Revenue Form 8871.

2. The general powers of SpeechNow lie with five voting "members": David Keating, Jon Coupal, Edward Crane, Daniel Shapiro, and Richard Marder. Bylaws, Art. I, § 5; Art. III, §§ 1, 2.

3. SpeechNow's bylaws designate four officers of the association: president, vice president, secretary, and treasurer. *Id.*, Art. V, § 1. Keating is the president and treasurer of SpeechNow, and he administers all of the association's affairs. Keating Decl. at ¶ 2. Coupal is the vice president and secretary. Keating Decl., Ex. D, Member Action by Written Consent in Lieu of an Organizational Meeting of SpeechNow.

4. SpeechNow undertakes that it will operate solely on private donations from individuals. Keating Decl. at ¶ 8; Bylaws, Art. II. Under its bylaws, SpeechNow cannot accept, directly or indirectly, any donations or anything of value from business corporations, labor organizations, national banks, federal government contractors, foreign nationals, political parties, or political committees. Keating Decl. at ¶ 8; Bylaws, Art. VI, § 9; Art X, § 1.

5. Under its bylaws, SpeechNow cannot engage in business activities, including the provision of any goods or services, or any advertising or promotional activity that resulting in income to SpeechNow, except as such activity may attract membership dues or donations. Keating Decl. at ¶ 12. SpeechNow cannot offer to any donors or members any benefit that would operate as a disincentive for them to disassociate with SpeechNow on the basis of the organization's position on a political issue, and it cannot offer its donors or members credit cards, insurance policies, savings plans, training, education, business information, or any other benefits other

than those that are necessary to enable recipients to engage in the promotion of SpeechNow's political ideas. Keating Decl. at ¶ 8; Bylaws, Art. VI, §§ 6, 8.

6. SpeechNow is independent of any political candidates, political committees, and political party committees, within the meaning of federal campaign finance statutes and the FEC's coordination rules, and its bylaws require that it operate wholly independently of any of these entities. Keating Decl. at ¶ 9; Bylaws, Art. VI, § 9; Art. X, §§ 2-10. SpeechNow cannot make contributions or donations of any kind directly or indirectly to any FEC-regulated candidate or political committee, and it cannot coordinate its activities, as defined in 2 U.S.C. §§ 441a(a)(7)(B) & (C) and 11 C.F.R. Part 109, with any candidates, national, state, district, or local political party committees, or their agents. Bylaws, Art. VI § 10; Art. X §§ 2-10.

7. SpeechNow's bylaws prohibit it from using any vendors for services in producing or distributing its communications featuring a candidate for federal office if that vendor was also engaged during the same election cycle by the candidate featured in the communication. Bylaws, Art. X, § 2. The bylaws similarly prohibit SpeechNow from employing any individuals who were employed during the same election cycle by any candidate featured in any of SpeechNow's communications. *Id.*, Art. X, § 3.

8. SpeechNow's bylaws promote the independence of the association's speech by requiring

members, officers, employees, and agents of the association to read and understand the FEC's rules concerning coordination, 11 C.F.R. § 109.21, Bylaws, Art. X, § 4, and by prohibiting them from engaging in activities that might lead to coordination with candidates. Bylaws, Art. X, §§ 5-10.

9. Under SpeechNow's bylaws, all of the obligations and prohibitions found in the bylaws must be communicated to all members, officers, employees, agents, and donors of SpeechNow, and employees and agents must sign an acknowledgment of these obligations as a condition of participating in any association activities. Bylaws, Art. X, § 11. Each of SpeechNow's members and officers has signed such an acknowledgment. Keating Decl. Ex. I, SpeechNow Affirmation.

10. SpeechNow's purpose is "expressly advocating the election of candidates who support rights to free speech and association and the defeat of candidates who oppose those rights, particularly by supporting campaign finance laws." Am. Compl. ¶ 8.

B. Involvement of individual plaintiffs

11. David Keating is solely responsible for SpeechNow's day-to-day activities. SpeechNow Response to FEC Interrogatory 1, FEC Exh. 105 at 16; Keating Dep. at 149, FEC Exh. 11.

12. Keating decides in what elections SpeechNow will run advertisements supporting or opposing

particular candidates. Keating keeps the other officer (vice-president Jon Coupal) and four board members of SpeechNow apprised of his decisions and expects to consult them from time to time. SpeechNow Response to FEC Interrogatory 7, FEC Exh. 105 at 22-23.

13. Keating created SpeechNow's web site, participates in the creation of all advertisements SpeechNow wishes to publish or broadcast, and administers all of SpeechNow's affairs. Am. Compl. ¶ 8.

14. Keating personally selected the candidates for SpeechNow to support or oppose in 2008. Keating Dep. at 162, FEC Exh. 11. Keating also expects to pick the candidates that SpeechNow will support or oppose in future elections, with the possible help of paid staff. Keating Dep. at 162, FEC Exh. 11.

15. Keating would like to donate money to SpeechNow to support its mission and activities. Keating Decl. at ¶ 39. Keating would donate $5,500 to the group, and make additional contributions in the future, if doing so would not require SpeechNow to register as a political committee under federal law. Keating Decl. at ¶¶ 39, 51-52.

16. Fred M. Young would like to donate $110,000 to SpeechNow. Declaration of Fred M. Young, Jr. in Support of Proposed Findings of Fact (hereinafter, "Young Decl.") at ¶ 6.

17. Other than donating to SpeechNow, Young does not anticipate any involvement with SpeechNow in the future. Young Dep. at 88, FEC Exh. 19.

18. Edward Crane would like to donate $6,000 to SpeechNow. Declaration of Edward Crane in Support of Proposed Findings of Fact (hereinafter, "Crane Decl.") at ¶ 6. He would like to make additional contributions to SpeechNow in the future. *Id.* at ¶ 8.

19. Young and Crane support SpeechNow's mission and believe that calling for the election or defeat of candidates based on their support for First Amendment rights is an ideal way to affect policy and promote the importance of free speech. Young Decl. at ¶ 3; Crane Decl. at ¶ 3. They both lack the time and experience to produce advertisements that can reach a wide segment of the population. Young Decl. at ¶ 4; Crane Decl. at ¶ 4. They believe that associating with other like-minded individuals and a group like SpeechNow is a more effective way to speak against candidates who support restrictions on free speech. *Id.*

20. Brad Russo and Scott Burkhardt support SpeechNow's mission and believe that calling for the election or defeat of candidates based on their support of First Amendment rights is an ideal way to affect policy and promote the importance of free speech. Russo Decl. at ¶ 3; Burkhardt Decl. at ¶ 3.

21. Russo and Burkhardt want to make immediate donations to SpeechNow of $100 each. Keating

Decl. at ¶¶ 50-51. SpeechNow has decided not to accept these donations because doing so would bring it closer to becoming a "political committee" under the campaign finance laws. *Id.* at ¶ 50.

22. All of the individual plaintiffs have read and agreed to abide by SpeechNow's bylaws. Keating Decl. at ¶¶ 8, 9; Crane Decl. at ¶ 5; Young Decl. at ¶ 5; Russo Decl. at ¶ 5; Burkhardt Decl. at ¶ 5. They acknowledge that their donations will be used to fund speech, including advertisements, that will advocate the election and/or defeat of candidates to federal office based upon their positions on freedom of speech and campaign finance laws. They understand that SpeechNow is an independent group that will not make any contributions to candidates, political committees, or political parties (or any of their agents) and will not coordinate its activities with candidates, candidate committees, or political party committees. Keating Decl. at ¶ 9; Crane Decl. at ¶ 5; Young Decl. at ¶ 5; Russo Decl. at ¶ 5; Burkhardt Decl. at ¶ 5.

II. SpeechNow's planned activities

A. Fundraising

23. SpeechNow intends to solicit donations from individuals to cover operating expenses and to buy political advertising that promotes the election or defeat of candidates based on their positions on free speech and associational rights. Keating Decl. at ¶ 11. Some of SpeechNow's solicitations will refer to

particular candidates for federal office by name. *Id.*; Declaration of Steven M. Simpson in Support of Plaintiffs' Proposed Findings of Fact (hereinafter, "Simpson Decl.") Ex. 1, Supplement to AOR 2007-32 (Sample SpeechNow Solicitation).

24. In its solicitations, SpeechNow intends to inform potential donors that their donations may be used for political advertising that will advocate the election or defeat of candidates to federal office based on their support for First Amendment rights. Keating Decl. at ¶ 11. Under its bylaws, SpeechNow must also advise donors that their donations are not tax deductible and that they will be spent at the sole discretion of SpeechNow. *Id.* at ¶ 13; *Bylaws*, Art. VI, § 11.

25. SpeechNow's solicitations will state that donors will not play a role in determining how their donations will be spent. Draft Solicitations for SpeechNow, SNK0259-0273 at 0260, 0263, 0268, 0273, FEC Exh. 20.

26. Keating has set up a PayPal account to allow individuals to donate money to SpeechNow. Keating Decl. at ¶ 53; Keating Decl. Ex. M, Email from PayPal.com confirming SpeechNow account.

27. As of August 2008, 182 people had indicated on SpeechNow's website that they were interested in receiving the association's newsletters. SNK0370-0372, FEC Exh. 20. Seventy-five of those people stated that they were interested in making a donation. *Id.*

B. Advertising

28. SpeechNow intended to run advertisements on television and on other media during the 2008 election cycle and plans to run similar advertisements in future election cycles. Keating Decl. at ¶¶ 15-20, 30.

29. For the 2008 election cycle, SpeechNow had prepared television scripts for four advertisements. Keating Decl., Ex. J, SpeechNow Television Scripts. Two of the advertisements called for the defeat of Dan Burton, a Republican Congressman who ran for reelection in the Fifth District of Indiana. Both ads criticized Representative Burton for voting for a bill that would restrict the speech of many public interest groups. The first urged voters to "Say no to Burton for Congress." The second stated: "Dan Burton voted to restrict our rights. Don't let him do it again." *Id.*; Keating Decl. at ¶ 18. SpeechNow would have liked to broadcast these advertisements in the Fifth District of Indiana, where Representative Burton was running for office. *Id.* at ¶¶ 20-24.

30. The other two advertisements called for the defeat of Mary Landrieu, a Democratic Senator who ran for reelection in Louisiana. Keating Decl. at ¶ 19. Both ads criticized Landrieu for voting for a law to restrict the speech of public interest groups. The first urged voters to "Say no to Landrieu for Senate." The second concluded by saying: "Our founding fathers made free speech the First Amendment to the Constitution. Mary Landrieu is taking that right

away. Don't let her do it again." *Id.*; Keating Decl., Ex. J. SpeechNow would have liked to broadcast those advertisements in Louisiana, where Senator Landrieu was running for office. Keating Decl. at ¶¶ 20-24.

31. The production costs for those advertisements would have been approximately $12,000. Keating Decl. at ¶ 21; Simpson Decl. Ex. 2, Declaration of Ed Traz in Support of Plaintiffs' Motion for Preliminary Injunction with Exhibits, dated February 8, 2008, at ¶¶ 3-5.

32. The cost to air the advertisements would have depended on the number of times they ran and the size of the audience SpeechNow wanted to reach. Keating Decl. at ¶¶ 21-24; Simpson Decl. Ex. 2 at ¶¶ 3-5.

33. Keating would have liked to run the ads enough times so that the target audience could have viewed the ads at least ten times. Such an ad buy would have cost roughly $400,000. Keating Decl. at ¶ 24.

34. Keating made and will make the decisions about where and in what races to run SpeechNow's advertisements, although he expects to keep the other members of SpeechNow apprised of his decisions. Keating Decl. at ¶ 25. Keating will base his decisions primarily on two factors: (1) the candidates' records on freedom of speech and/or campaign finance laws; and (2) whether the race is close enough that

SpeechNow's ads might have an impact on the outcome. *Id.* at ¶ 26.

35. Keating decided that SpeechNow should run ads in Congressman Burton's primary because the Congressman voted for H.R. 513, a bill that restricted the free speech rights of certain non-profit organizations, and Keating felt that Burton was vulnerable to defeat. Keating Decl. at ¶ 27. Keating spoke to Congressman Burton's opponent, John McGoff, and discovered that he supported freedom of speech and opposed campaign finance laws that infringed on freedom of speech. *Id.* As a result, Keating concluded that running ads highlighting Congressman Burton's record on campaign finance laws would be a good way to convey to Republicans that they should support freedom of speech and oppose campaign finance laws that would infringe on rights to free speech. *Id.*

36. He decided that SpeechNow should run ads against Mary Landrieu because her election was a high-profile race, and she has consistently supported campaign finance legislation that in Keating's view infringed on freedom of speech. Keating Decl. at ¶ 28. Keating never ascertained what Landrieu's opponent's position was on speech issues because it was not clear at the time who Landrieu's ultimate opponent would be. He concluded that Landrieu's opponent could not have a worse position on free speech (from SpeechNow's perspective), and that running ads in her race would increase the chances of

her defeat and garner attention for SpeechNow and its message and mission. *Id.*

37. SpeechNow would have run ads in additional races during the 2008 election cycle if it had been able to do so without becoming a "political committee," subject to contribution limits and other requirements that apply to political committees. SpeechNow would consider broadcasting advertisements opposing any candidate who voted for the Bipartisan Campaign Reform Act; any candidate who voted for or sponsored H.R. 513 as passed by the House of Representatives in 2006, or similar legislation; or any candidate who supported legislation to create a Federal Election Administration such as that proposed by H.R. 421 in the 110th Congress. SpeechNow would consider broadcasting advertisements supporting candidates who took the opposite positions. Keating Decl. at ¶ 29.

38. If it is able to operate without being treated as a political committee under federal campaign finance laws, SpeechNow would run ads in future election cycles. In the 2010 election cycle, SpeechNow would like to run advertisements opposing North Dakota Democratic Senator Byron Dorgan. Keating Decl. at ¶ 30. SpeechNow would consider running advertisements opposing Alaska Republican Senator Lisa Murkowski as well, if she has a credible primary opponent. *Id.*

39. If SpeechNow were able to function and run ads in future elections without becoming subject to

the contribution limits and other requirements that apply to political committees, it intends to make decisions about where to run such ads consistent with the general approach described in paragraph 34. Keating Decl. at ¶ 26. If SpeechNow is able to raise enough funds, it intends to use methods such as candidate research to determine the past statements and positions of candidates on free speech, and public opinion polling to obtain more information about the viability of particular candidates in particular races. *Id.* at ¶ 32.

III. The effect of the challenged provisions on the plaintiffs' plans

A. Contribution limits

40. FECA limits contributions by individuals to nonconnected political committees to $5,000 per calendar year. 2 U.S.C. §§ 431(11), 441a(a)(1)(C).

41. If Keating, Crane, or Young made contributions to SpeechNow in the amounts and for the purposes stated in their declarations, their contributions would violate the law because they exceed the contribution limits set forth in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3). Simpson Decl. Ex. 14 (FEC Response to Request for Admission No. 12).

42. In addition to exceeding the Act's limit on contributions to a political committee, Young's desired contribution would exceed the Act's biennial aggregate limit of $108,200 on contributions by an

individual to all candidates and committees. 2 U.S.C. §§ 431(11), 441a(a)(1)(C), 441a(a)(3); *see* 72 Fed. Reg. 5294, 5295 (Feb. 5, 2007).

43. The planned contributions by Russo and Burkhardt are below the Act's limit on contributions by individuals to nonconnected committees. 2 U.S.C. §§ 431(11), 441a(a)(1)(C), 441a(a)(3); *see* 72 Fed. Reg. 5294, 5295 (Feb. 5, 2007).

44. Russo and Burkhardt's planned contributions will not put them over the aggregate contribution limit. Burkhardt Dep. at 25-26, 31-32, FEC Exh. 7; Russo Dep. at 30-32, FEC Exh. 13.

45. Both SpeechNow and Keating (as its treasurer) face the threat of prosecution if SpeechNow accepts contributions over the limits contained in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3). Keating, Crane, and Young face a threat of prosecution if they make contributions to SpeechNow above those limits. Simpson Decl. Ex. 14 (FEC Responses to Requests for Admission Nos. 1-3, 5-13).

46. Under 2 U.S.C. § 437g(d) and the FEC's practices and policies, Keating, as treasurer of SpeechNow, would be liable in his personal capacity for any knowing and willful violations of the contribution limits or reporting obligations that he commits. Simpson Decl. Ex. 14 (FEC Responses to Requests for Admission Nos. 10 & 11).

47. If SpeechNow had accepted the planned contributions of the individual plaintiffs, SpeechNow

would have had enough money to fund advertisements in at least two election contests during the 2008 election cycle. Keating Decl. at ¶ 22; Simpson Decl. Ex. 2 at 4; *see* Keating Decl. Ex. K, Traz Group Bid for Burton and Landrieu Advertisements.

48. SpeechNow has voluntarily chosen not to accept any contributions during the pendency of this case – even contributions of less than $5,000 – and has declined the contributions that have been offered to date because it does not wish to become a "political committee" under federal law. Keating Dep. at 165-166, FEC Exhibit 11; SpeechNow Response to FEC Interrogatory 9, FEC Exh. 105 at 23.

B. Organizational, administrative, and reporting requirements

49. Currently, SpeechNow reports its contributions and expenditures under the reporting requirements for those groups that make independent expenditures. Keating Decl. at ¶ 35. Groups "other than political committees" that make independent expenditures must report their activities pursuant to the FEC regulations at 11 CFR §§ 104.4(a), (e), and (f), and § 109.10. Scott Dep. at 95:7-98:14.

50. To report its independent expenditures, SpeechNow uses the "Report of Independent Expenditures Made and Contributions Received," or FEC Form 5. Simpson Decl. Ex. 31, FEC Form 5, Report of Independent Expenditures Made and Contributions Received; Scott Dep. at 101:6-102:1.

This form requires the filer to list the total contributions received and the total expenditures made during the period on a one-page form, and then to list those who contributed to the independent expenditure and the payees for the independent expenditures. It is accompanied by three pages of instructions. Simpson Decl. Ex. 32, Instructions for FEC Form 5 and Related Schedules.

51. If SpeechNow decided to make independent expenditures against candidates for state or local office, its reporting obligations to the FEC would not change or increase. Scott Dep. at 107:7-108:5.

52. Because SpeechNow does not accept any targeted or "earmarked" funds, it need only disclose all of its contributors who provided money "for the purpose of furthering" its independent expenditures. Keating Decl. at ¶ 36; 2 U.S.C. 434(c)(2)(C). For each independent expenditure SpeechNow were to make, SpeechNow would have to disclose all donors whose contributions were given for such purpose and were used to fund any portion of the independent expenditure at issue. *Id.*

53. If SpeechNow were to accept donations that, in the aggregate, were in excess of $1,000, it would have to register as a "political committee" with the FEC. Keating Decl. at 45; Simpson Decl. Ex. 14 (FEC Response to Request to Admit No. 1); Scott Dep. at 93:3-14.

54. If SpeechNow were deemed to be a political committee, it would be classified as a "non-connected" committee. Scott Dep. at 17:14-18:2.

55. David Keating, as treasurer of SpeechNow, is responsible for complying with the reporting requirements that would apply to SpeechNow if it were treated as a political committee under federal law. Keating Decl. at ¶ 14; Bylaws, Art. V, § 8.

56. Any organization that qualifies as a political committee must register with the FEC by filing FEC Form 1, a four-page form. 2 U.S.C. § 433; FEC Form 1 and Instructions, FEC Exh. 125-126. The four-page form requires committees to list the committee name and address, to designate a treasurer and custodian of records, and to list all bank accounts in which committee funds are deposited. Simpson Decl. Ex. 26, FEC Form 1, Statement of Organization; Scott Dep. at 122:15-123:14. Any changes to the Statement of Registration must be made within 10 days. Scott Dep. at 123:22-124:6. The form comes with an additional five pages of instructions. Simpson Decl. Ex. 27, Instructions for FEC Form 1.

57. Political committees must file periodic reports for disclosure to the public of all receipts and disbursements to or from a person in excess of $200 in a calendar year, as well as total operating expenses and cash on hand. *See* 2 U.S.C. §§ 433-34.

58. All costs associated with a fundraiser for a non-connected committee must be treated as expenses to be paid by the committee lest any costs

for the event be treated as an in-kind contribution attributable to the committee. Scott Dep. at 142:1-143:7. The costs are to be determined by assessing the usual and normal charge for, or fair market value of, that portion of the home, invitations, and food. *Id.* at 143:8-14. These costs must be reported on Form 3X. *Id.* at 123:7-16; Simpson Decl. Ex. 29 at 10-11 (Instructions for Schedule A, Itemized Receipts).

59. If a non-connected committee were to make independent expenditures in state or local elections, it would have to allocate its costs for fundraising and communications according to regulations at 11 CFR Part 106. Scott Dep. at 143:15-144:5. The committee would also report the allocations using various Schedules H, which are accompanied by seven pages of instructions. Scott Dep. at 146:12-148:9; Simpson Decl. Ex. 29 at 23-30.

60. Under 2 U.S.C. § 434(c), if SpeechNow were treated as a political committee, it would have to file statements with the FEC reporting the identities of those who contributed "for the purpose of furthering" its advertisements and other communications, along with the amounts contributed and the other information required by this provision. Keating Decl. at ¶ 35; 2 U.S.C. § 434(c)(2)(c).

61. Under 2 U.S.C. § 441d(d)(2), SpeechNow's advertisements would have to include a statement indicating that SpeechNow was responsible for the content of the advertisement. Keating Decl. at ¶ 34.

62. Under 2 U.S.C. § 441d(a), all of SpeechNow's advertisements and other communications would have to include its name, address, and telephone number or World Wide Web address, along with a statement indicating that the communication was paid for by SpeechNow and was not authorized by any candidate or candidate's committee. Keating Decl. at ¶ 33.

63. The FEC's Reports Analysis Division (RAD) analyzes reports filed by committees and other entities to determine whether they are in compliance with campaign finance laws and regulations. Scott Dep. at 67:7-11. Employees of RAD often send committee treasurers Requests for Additional Information (RFAI) that seek information necessary for the Commission to determine whether a committee is complying with the law. Scott Dep. at 71:13-72:1. A failure of a political committee to answer an RFAI can result in an investigation and a recommendation that the Commission seek a conciliation agreement with the committee that results in a civil penalty. *Id.* at 73:7-20.

64. All administrative fines issued by the Commission relate to the failure to properly report the activities of a political committee. Scott Dep. at 80:19-81:6. The Commission resolves approximately 100 administrative fine matters per year, and the amount of fines collected is $201,963 from the Administrative Fines Program alone. Simpson Decl. Ex. 30, Federal Election Commission 2006 Annual Report, at 7. This is an average civil penalty of at

least $2,000. Still other civil penalties for failing to properly administer or report the activities of political committees are collected through the Commission's standard enforcement process, and alternative dispute resolution programs. Scott Dep. at 82:3-12.

65. The FEC can investigate alleged violations of the campaign finance laws that are brought to its attention through administrative complaints filed under 11 CFR § 111.4 or that its staff discovers and has "reason to believe" that a violation has occurred. Simpson Decl. Ex. 14 (FEC Response to Interrogatory No. 6).

JAMES ROBERTSON
United States District Judge

2 USCS § 431. Definitions

When used in this Act:

(1) The term "election" means –

(A) a general, special, primary, or runoff election;

(B) a convention or caucus of a political party which has authority to nominate a candidate;

(C) a primary election held for the selection of delegates to a national nominating convention of a political party; and

(D) a primary election held for the expression of a preference for the nomination of individuals for election to the office of President.

(2) The term "candidate" means an individual who seeks nomination for election, or election, to Federal office, and for purposes of this paragraph, an individual shall be deemed to seek nomination for election, or election –

(A) if such individual has received contributions aggregating in excess of $ 5,000 or has made expenditures aggregating in excess of $ 5,000; or

(B) if such individual has given his or her consent to another person to receive contributions or make expenditures on behalf of such individual and if such person has received such contributions aggregating in excess of $ 5,000 or has made such expenditures aggregating in excess of $ 5,000.

(3) The term "Federal office" means the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress.

(4) The term "political committee" means –

(A) any committee, club, association, or other group of persons which receives contributions aggregating in excess of $ 1,000 during a calendar year or which makes expenditures aggregating in excess of $ 1,000 during a calendar year; or

(B) any separate segregated fund established under the provisions of section 316(b) [2 USCS § 441b(b)]; or

(C) any local committee of a political party which receives contributions aggregating in excess of $ 5,000 during a calendar year, or makes payments exempted from the definition of contribution or expenditure as defined in section 301(8) and (9) aggregating in excess of $ 5,000 during a calendar year, or makes contributions aggregating in excess of $ 1,000 during a calendar year or makes expenditures aggregating in excess of $ 1,000 during a calendar year.

(5) The term "principal campaign committee" means a political committee designated and authorized by a candidate under section 302(e)(1) [2 USCS § 432(e)(1)].

(6) The term "authorized committee" means the principal campaign committee or any other political

committee authorized by a candidate under section 302(e)(1) [2 USCS § 432(e)(1)] to receive contributions or make expenditures on behalf of such candidate.

(7) The term "connected organization" means any organization which is not a political committee but which directly or indirectly establishes, administers or financially supports a political committee.

(8) (A) The term "contribution" includes –

(i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or

(ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.

(B) The term "contribution" does not include –

(i) the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee;

(ii) the use of real or personal property, including a church or community room used on a regular basis by members of a community for noncommercial purposes, and the cost of invitations, food, and beverages, voluntarily provided by an individual to any candidate or any political committee of a political party in rendering voluntary personal

services on the individual's residential premises or in the church or community room for candidate-related or political party-related activities, to the extent that the cumulative value of such invitations, food, and beverages provided by such individual on behalf of any single candidate does not exceed $ 1,000 with respect to any single election, and on behalf of all political committees of a political party does not exceed $ 2,000 in any calendar year;

(iii) the sale of any food or beverage by a vendor for use in any candidate's campaign or for use by or on behalf of any political committee of a political party at a charge less than the normal comparable charge, if such charge is at least equal to the cost of such food or beverage to the vendor, to the extent that the cumulative value of such activity by such vendor on behalf of any single candidate does not exceed $ 1,000 with respect to any single election, and on behalf of all political committees of a political party does not exceed $ 2,000 in any calendar year;

(iv) any unreimbursed payment for travel expenses made by any individual on behalf of any candidate or any political committee of a political party, to the extent that the cumulative value of such activity by such individual on behalf of any single candidate does not exceed $ 1,000 with respect to any single election, and on behalf of all political committees of a political party does not exceed $ 2,000 in any calendar year;

(v) the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card or sample ballot, or other printed listing, of 3 or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply to any cost incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines, or similar types of general public political advertising;

(vi) any payment made or obligation incurred by a corporation or a labor organization which, under section 316(b) [2 USCS § 441b(b)], would not constitute an expenditure by such corporation or labor organization;

(vii) any loan of money by a State bank, a federally chartered depository institution, or a depository institution the deposits or accounts of which are insured by the Federal Deposit Insurance Corporation, Federal Savings and Loan Insurance Corporation, or the National Credit Union Administration, other than any overdraft made with respect to a checking or savings account, made in accordance with applicable law and in the ordinary course of business, but such loan –

(I) shall be considered a loan by each endorser or guarantor, in that proportion of the

unpaid balance that each endorser or guarantor bears to the total number of endorsers or guarantors;

(II) shall be made on a basis which assures repayment, evidenced by a written instrument, and subject to a due date or amortization schedule; and

(III) shall bear the usual and customary interest rate of the lending institution;

(viii) any legal or accounting services rendered to or on behalf of –

(I) any political committee of a political party if the person paying for such services is the regular employer of the person rendering such services and if such services are not attributable to activities which directly further the election of any designated candidate to Federal office; or

(II) an authorized committee of a candidate or any other political committee, if the person paying for such services is the regular employer of the individual rendering such services and if such services are solely for the purpose of ensuring compliance with this Act or chapter 95 or chapter 96 of the Internal Revenue Code of 1954 [1986] [26 USCS §§ 9001 et seq. or 9031 et seq.].

but amounts paid or incurred by the regular employer for such legal or accounting services shall be reported in accordance with section 304(b) [2 USCS § 434(b)] by the committee receiving such services;

(ix) the payment by a State or local committee of a political party of the costs of campaign materials (such as pins, bumper stickers, handbills, brochures, posters, party tabloids, and yard signs) used by such committee in connection with volunteer activities on behalf of nominees of such party: *Provided*, That –

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or particular candidates;

(x) the payment by a candidate, for nomination or election to any public office (including State or local office), or authorized committee of a candidate, of the costs of campaign materials which include information on or referenced to any other candidate and which are used in connection with volunteer activities (including pins, bumper stickers, handbills, brochures, posters, and yard signs, but not including the use of .broadcasting, newspapers, magazines, billboards, direct mail, or similar types of general public communication or political advertising): *Provided*, That such payments are made from

contributions subject to the limitations and prohibitions of this Act;

(xi) the payment by a State or local committee of a political party of the costs of voter registration and get-out-the-vote activities conducted by such committee on behalf of nominees of such party for President and Vice President: *Provided*, That –

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or candidates;

(xii) payments made by a candidate or the authorized committee of a candidate as a condition of ballot access and payments received by any political party committee as a condition of ballot access;

(xiii) any honorarium (within the meaning of section 323 of this Act [2 USCS § 441i]); and

(xiv) any loan of money derived from an advance on a candidate's brokerage account, credit card, home equity line of credit, or other line of credit available to the candidate, if such loan is made in accordance with applicable law and under commercially reasonable terms and if the person making such loan makes loans derived from an advance on the candidate's brokerage account, credit card, home equity line of credit, or other line of credit in the normal course of the person's business.

(9) (A) The term "expenditure" includes –

(i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and

(ii) a written contract, promise, or agreement to make an expenditure.

(B) The term "expenditure" does not include –

(i) any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(ii) nonpartisan activity designed to encourage individuals to vote or to register to vote;

(iii) any communication by any membership organization or corporation to its members, stockholders, or executive or administrative personnel, if such membership organization or corporation is not organized primarily for the purpose of influencing the nomination for election, or election, of any individual to Federal office, except that the costs incurred by a membership organization (including a labor organization) or by a corporation directly attributable to a communication expressly advocating the election or defeat of a clearly identified candidate (other than a communication primarily devoted to subjects other than the express advocacy of the election or defeat of a clearly identified candidate), shall, if such costs exceed $ 2,000 for any election, be reported to the Commission in accordance with section 434(a)(4)(A)(i) [2 USCS § 434(a)(4)(A)(i)], and in accordance with section 304(a)(4)(A)(ii) [2 USCS § 434(a)(4)(A)(ii)] with respect to any general election;

(iv) the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card or sample ballot, or other printed listing, of 3 or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply to costs incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines,

or similar types of general public political advertising;

(v) any payment made or obligation incurred by a corporation or a labor organization which, under section 316(b) [2 USCS § 441b(b)], would not constitute an expenditure by such corporation or labor organization;

(vi) any costs incurred by an authorized committee or candidate in connection with the solicitation of contributions on behalf of such candidate, except that this clause shall not apply with respect to costs incurred by an authorized committee of a candidate in excess of an amount equal to 20 percent of the expenditure limitation applicable to such candidate under section 315(b) [2 USCS § 441a(b)], but all such costs shall be reported in accordance with section 434(b) [2 USCS § 434(b)];

(vii) the payment of compensation for legal or accounting services –

(I) rendered to or on behalf of any political committee of a political party if the person paying for such services is the regular employer of the individual rendering such services, and if such services are not attributable to activities which directly further the election of any designated candidate to Federal office; or

(II) rendered to or on behalf of a candidate or political committee if the person paying for such services is the regular employer of the

individual rendering such services, and if such services are solely for the purpose of ensuring compliance with this Act or chapter 95 or chapter 96 of the Internal Revenue Code of 1954 [1986] [26 USCS §§ 9001 et seq. or 9031 et seq.]

but amounts paid or incurred by the regular employer for such legal or accounting services shall be reported in accordance with section 304(b) [2 USCS § 434(b)] by the committee receiving such services;

(viii) the payment by a State or local committee of a political party of the costs of campaign materials (such as pins, bumper stickers, handbills, brochures, posters, party tabloids, and yard signs) used by such committee in connection with volunteer activities on behalf of nominees of such party: *Provided*, That –

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or particular candidates;

(ix) the payment by a State or local committee of a political party of the costs of voter registration and get-out-the-vote activities conducted by such committee on behalf of nominees of such party for President and Vice President: *Provided*, That –

(1) such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising;

(2) such payments are made from contributions subject to the limitations and prohibitions of this Act; and

(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate or candidates; and

(x) payments received by a political party committee as a condition of ballot access which are transferred to another political party committee or the appropriate State official.

(10) The term "Commission" means the Federal Election Commission.

(11) The term "person" includes an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government.

(12) The term "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States.

(13) The term "identification" means –

(A) in the case of any individual, the name, the mailing address, and the occupation of such individual, as well as the name of his or her employer; and

(B) in the case of any other person, the full name and address of such person.

(14) The term "national committee" means the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the national level, as determined by the Commission.

(15) The term "State committee" means the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the State level, as determined by the Commission.

(16) The term "political party" means an association, committee, or organization which nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization.

(17) Independent expenditure. The term "independent expenditure" means an expenditure by a person –

(A) expressly advocating the election or defeat of a clearly identified candidate; and

(B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents.

(18) The term "clearly identified" means that –

(A) the name of the candidate involved appears;

(B) a photograph or drawing of the candidate appears; or

(C) the identity of the candidate is apparent by unambiguous reference.

(19) The term "Act" means the Federal Election Campaign Act of 1971 as amended.

(20) . Federal election activity

(A) In general. The term "Federal election activity" means –

(i) voter registration activity during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election;

(ii) voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot);

(iii) a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate); or

(iv) services provided during any month by an employee of a State, district, or local committee of a political party who spends more than 25 percent of that individual's compensated time during that month on activities in connection with a Federal election.

(B) Excluded activity. The term "Federal election activity" does not include an amount expended or disbursed by a State, district, or local committee of a political party for –

(i) a public communication that refers solely to a clearly identified candidate for State or local office, if the communication is not a Federal election activity described in subparagraph (A)(i) or (ii);

(ii) a contribution to a candidate for State or local office, provided the contribution is not designated to pay for a Federal election activity described in subparagraph (A);

(iii) the costs of a State, district, or local political convention; and

(iv) the costs of grassroots campaign materials, including buttons, bumper stickers, and yard signs, that name or depict only a candidate for State or local office.

(21) Generic campaign activity. The term "generic campaign activity" means a campaign activity that promotes a political party and does not promote a candidate or non-Federal candidate.

(22) Public communication. The term "public communication" means a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.

(23) Mass mailing. The term "mass mailing" means a mailing by United States mail or facsimile of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period.

(24) Telephone bank. The term "telephone bank" means more than 500 telephone calls of an

identical or substantially similar nature within any 30-day period.

(25) Election cycle. For purposes of sections 315(i) and 315A [2 USCS §§ 441a(i), 441a-1] and paragraph (26), the term "election cycle" means the period beginning on the day after the date of the most recent election for the specific office or seat that a candidate is seeking and ending on the date of the next election for that office or seat. For purposes of the preceding sentence, a primary election and a general election shall be considered to be separate elections.

(26) Personal funds. The term "personal funds" means an amount that is derived from –

(A) any asset that, under applicable State law, at the time the individual became a candidate, the candidate had legal right of access to or control over, and with respect to which the candidate had –

(i) legal and rightful title; or

(ii) an equitable interest;

(B) income received during the current election cycle of the candidate, including –

(i) a salary and other earned income from bona fide employment;

(ii) dividends and proceeds from the sale of the candidate's stocks or other investments;

(iii) bequests to the candidate;

(iv) income from trusts established before the beginning of the election cycle;

(v) income from trusts established by bequest after the beginning of the election cycle of which the candidate is the beneficiary;

(vi) gifts of a personal nature that had been customarily received by the candidate prior to the beginning of the election cycle; and

(vii) proceeds from lotteries and similar legal games of chance; and

(C) a portion of assets that are jointly owned by the candidate and the candidate's spouse equal to the candidate's share of the asset under the instrument of conveyance or ownership, but if no specific share is indicated by an instrument of conveyance or ownership, the value of 1/2 of the property.

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2 USCS § 432. Organization of political committees

(a) Treasurer; vacancy; official authorizations. Every political committee shall have a treasurer. No contribution or expenditure shall be accepted or made by or on behalf of a political committee during any period in which the office of treasurer is vacant. No expenditure shall be made for or on behalf of a political committee without the authorization of the treasurer or his or her designated agent.

(b) Account of contributions; segregated funds.

(1) Every person who receives a contribution for an authorized political committee shall, no later than 10 days after receiving such contribution, forward to the treasurer such contribution, and if the amount of the contribution is in excess of $ 50 the name and address of the person making the contribution and the date of receipt.

(2) Every person who receives a contribution for a political committee which is not an authorized committee shall –

(A) if the amount of the contribution is $ 50 or less, forward to the treasurer such contribution no later than 30 days after receiving the contribution; and

(B) if the amount of the contribution is in excess of $ 50, forward to the treasurer such contribution, the name and address of the person making the contribution, and the date of receipt of the contribution, no later than 10 days after receiving the contribution.

(3) All funds of a political committee shall be segregated from, and may not be commingled with, the personal funds of any individual.

(c) Recordkeeping. The treasurer of a political committee shall keep an account of –

(1) all contributions received by or on behalf of such political committee;

(2) the name and address of any person who makes any contribution in excess of $ 50, together with the date and amount of such contribution by any person;

(3) the identification of any person who makes a contribution or contributions aggregating more than $ 200 during a calendar year, together with the date and amount of any such contribution;

(4) the identification of any political committee which makes a contribution, together with the date and amount of any such contribution; and

(5) the name and address of every person to whom any disbursement is made, the date, amount, and purpose of the disbursement, and the name of the candidate and the office sought by the candidate, if any, for whom the disbursement was made, including a receipt, invoice, or canceled check for each disbursement in excess of $ 200.

(d) Preservation of records and copies of reports. The treasurer shall preserve all records required to be kept by this section and copies of all reports required to be filed by this subchapter for 3 years after the report is filed. For any report filed in electronic format under section 304(a)(11), the treasurer shall retain a machine-readable copy of the report as the copy preserved under the preceding sentence.

(e) Principal and additional campaign committees; designations, status of candidate, authorized committees, etc.

(1) Each candidate for Federal office (other than the nominee for the office of Vice President) shall designate in writing a political committee in accordance with paragraph (3) to serve as the principal campaign committee of such candidate. Such designation shall be made no later than 15 days after becoming a candidate. A candidate may designate additional political committees in accordance with paragraph (3) to serve as authorized committees of such candidate. Such designation shall be in writing and filed with the principal campaign committee of such candidate in accordance with subsection (f)(1).

(2) Any candidate described in paragraph (1) who receives a contribution, or any loan for use in connection with the campaign of such candidate for election, or makes a disbursement in connection with such campaign, shall be considered, for purposes of this Act, as having received the contribution or loan, or as having made the disbursement, as the case may be, as an agent of the authorized committee or committees of such candidate.

(3) (A) No political committee which supports or has supported more than one candidate may be designated as an authorized committee, except that –

(i) the candidate for the office of President nominated by a political party may designate the national committee of such political party as a principal campaign committee, but only if that national committee maintains separate books of

account with respect to its function as a principal campaign committee; and

(ii) candidates may designate a political committee established solely for the purpose of joint fundraising by such candidates as an authorized committee.

(B) As used in this section, the term "support" does not include a contribution by any authorized committee in amounts of $ 2,000 or less to an authorized committee of any other candidate.

(4) The name of each authorized committee shall include the name of the candidate who authorized such committee under paragraph (1). In the case of any political committee which is not an authorized committee, such political committee shall not include the name of any candidate in its name.

(5) The name of any separate segregated fund established pursuant to section 316(b) [2 USCS § 441b(b)] shall include the name of its connected organization.

(f) Filing with and receipt of designations, statements, and reports by principal campaign committee.

(1) Notwithstanding any other provision of this Act, each designation, statement, or report of receipts or disbursements made by an authorized committee of a candidate shall be filed with the candidate's principal campaign committee.

(2) Each principal campaign committee shall receive all designations, statements, and reports required to be filed with it under paragraph (1) and shall compile and file such designations, statements, and reports in accordance with this Act.

(g) Filing with and receipt of designations, statements, and reports by Secretary of Senate; forwarding to Commission; filing requirements with Commission; public inspection and preservation of designations, etc.

(1) Designations, statements, and reports required to be filed under this Act by a candidate for the office of Senator, by the principal campaign committee of such candidate, and by the Republican and Democratic Senatorial Campaign Committees shall be filed with the Secretary of the Senate, who shall receive such designations, statements, and reports, as custodian for the Commission.

(2) The Secretary of the Senate shall forward a copy of any designation, statement, or report filed with the Secretary under this subsection to the Commission as soon as possible (but no later than 2 working days) after receiving such designation, statement, or report.

(3) All designations, statements, and reports required to be filed under this Act, except designations, statements, and reports filed in accordance with paragraph (1), shall be filed with the Commission.

(4) The Secretary of the Senate shall make the designations, statements, and reports received under this subsection available for public inspection and copying in the same manner as the Commission under section 311(a)(4) [2 USCS § 438(a)(4)], and shall preserve such designations, statements, and reports in the same manner as the Commission under section 311(a)(5) [2 USCS § 438(a)(5)].

(h) Campaign depositories; designations, maintenance of accounts, etc.; petty cash fund for disbursements; record of disbursements.

(1) Each political committee shall designate one or more State banks, federally chartered depository institutions, or depository institutions the deposits or accounts of which are insured by the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the National Credit Union Administration, as its campaign depository or depositories. Each political committee shall maintain at least one checking account and such other accounts as the committee determines at a depository designated by such committee. All receipts received by such committee shall be deposited in such accounts. No disbursements may be made (other than petty cash disbursements under paragraph (2)) by such committee except by check drawn on such accounts in accordance with this section.

(2) A political committee may maintain a petty cash fund for disbursements not in excess of $ 100 to any person in connection with a single purchase or

transaction. A record of all petty cash disbursements shall be maintained in accordance with subsection (c)(5) of this section.

(i) Reports and records, compliance with requirements based on best efforts. When the treasurer of a political committee shows that best efforts have been used to obtain, maintain, and submit the information required by this Act for the political committee, any report or any records of such committee shall be considered in compliance with this Act or chapter 95 or chapter 96 of the Internal Revenue Code of 1954 [1986] [2 USCS §§ 9001 et seq. or 9031 et seq.].

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2 USCS § 433. Registration of political committees

(a) Statements of organizations. Each authorized campaign committee shall file a statement of organization no later than 10 days after designation pursuant to section 302(e)(1) [2 USCS § 432(e)(1)]. Each separate segregated fund established under the provisions of section 316(b) [2 USCS § 441b(b)] shall file a statement of organization no later than 10 days after establishment. All other committees shall file a statement of organization within 10 days after becoming a political committee within the meaning of section 301(4) [2 USCS § 431(4)].

(b) Contents of statements. The statement of organization of a political committee shall include –

(1) the name, address, and type of committee;

(2) the name, address, relationship, and type of any connected organization or affiliated committee;

(3) the name, address, and position of the custodian of books and accounts of the committee;

(4) the name and address of the treasurer of the committee;

(5) if the committee is authorized by a candidate, the name, address, office sought, and party affiliation of the candidate; and

(6) a listing of all banks, safety deposit boxes, or other depositories used by the committee.

(c) Change of information in statements. Any change in information previously submitted in a statement of organization shall be reported in accordance with section 302(g) [2 USCS § 432(g)] no later than 10 days after the date of the change.

(d) Termination, etc., requirements and authorities.

(1) A political committee may terminate only when such a committee files a written statement, in accordance with section 302(g) [2 USCS § 432(g)], that it will no longer receive any contributions or make any disbursements and that such committee has no outstanding debts or obligations.

(2) Nothing contained in this subsection may be construed to eliminate or limit the authority of the Commission to establish procedures for –

(A) the determination of insolvency with respect to any political committee;

(B) the orderly liquidation of an insolvent political committee, and the orderly application of its assets for the reduction of outstanding debts; and

(C) the termination of an insolvent political committee after such liquidation and application of assets.

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2 USCS § 434. Reporting requirements

(a) Receipts and disbursements by treasurers of political committees; filing requirements.

(1) Each treasurer of a political committee shall file reports of receipts and disbursements in accordance with the provisions of this subsection. The treasurer shall sign each such report.

(2) If the political committee is the principal campaign committee of a candidate for the House of Representatives or for the Senate –

(A) in any calendar year during which there is [a] regularly scheduled election for which such candidate is seeking election, or nomination for election, the treasurer shall file the following reports:

(i) a pre-election report, which shall be filed no later than the 12th day before (or posted by any of the following: registered mail, certified mail, priority mail having a delivery confirmation, or

express mail having a delivery confirmation, or delivered to an overnight delivery service with an on-line tracking system, if posted or delivered no later than the 15th day before) any election in which such candidate is seeking election, or nomination for election, and which shall be complete as of the 20th day before such election;

(ii) a post-general election report, which shall be filed no later than the 30th day after any general election in which such candidate has sought election, and which shall be complete as of the 20th day after such general election; and

(iii) additional quarterly reports, which shall be filed no later than the 15th day after the last day of each calendar quarter, and which shall be complete as of the last day of each calendar quarter: except that the report for the quarter ending December 31 shall be filed no later than January 31 of the following calendar year; and

(B) in any other calendar year the treasurer shall file quarterly reports, which shall be filed not later than the 15th day after the last day of each calendar quarter, and which shall be complete as of the last day of each calendar quarter, except that the report for the quarter ending December 31 shall be filed not later than January 31 of the following calendar year.

(3) If the committee is the principal campaign committee of a candidate for the office of President –

(A) in any calendar year during which a general election is held to fill such office –

(i) the treasurer shall file monthly reports if such committee has on January 1 of such year, received contributions aggregating $ 100,000 or made expenditures aggregating $ 100,000 or anticipates receiving contributions aggregating $ 100,000 or more or making expenditures aggregating $ 100,000 or more during such year: such monthly reports shall be filed no later than the 20th day after the last day of each month and shall be complete as of the last day of the month, except that, in lieu of filing the report otherwise due in November and December, a pre-general election report shall be filed in accordance with paragraph (2)(A)(i), a post-general election report shall be filed in accordance with paragraph (2)(A)(ii), and a year end report shall be filed no later than January 31 of the following calendar year;

(ii) the treasurer of the other principal campaign committees of a candidate for the office of President shall file a pre-election report or reports in accordance with paragraph (2)(A)(i), a post-general election report in accordance with paragraph (2)(A)(ii), and quarterly reports in accordance with paragraph (2)(A)(iii); and

(iii) if at any time during the election year a committee filing under paragraph (3)(A)(ii) receives contributions in excess of $ 100,000 or makes expenditures in excess of $ 100,000, the

treasurer shall begin filing monthly reports under paragraph (3)(A)(i) at the next reporting period; and

(B) in any other calendar year, the treasurer shall file either –

(i) monthly reports, which shall be filed no later than the 20th day after the last day of each month and shall be complete as of the last day of the month; or

(ii) quarterly reports, which shall be filed no later than the 15th day after the last day of each calendar quarter and which shall be complete as of the last day of each calendar quarter.

(4) All political committees other than authorized committees of a candidate shall file either –

(A) (i) quarterly reports, in a calendar year in which a regularly scheduled general election is held, which shall be filed no later than the 15th day after the last day of each calendar quarter: except that the report for the quarter ending on December 31 of such calendar year shall be filed no later than January 31 of the following calendar year;

(ii) a pre-election report, which shall be filed no later than the 12th day before (or posted by any of the following: registered mail, certified mail, priority mail having a delivery confirmation, or express mail having a delivery confirmation, or delivered to an overnight delivery service with an on-line tracking system, if posted or delivered no later than the 15th day before) any election in which the

committee makes a contribution to or expenditure on behalf of a candidate in such election, and which shall be complete as of the 20th day before the election;

(iii) a post-general election report, which shall be filed no later than the 30th day after the general election and which shall be complete as of the 20th day after such general election; and

(iv) in any other calendar year, a report covering the period beginning January 1 and ending June 30, which shall be filed no later than July 31 and a report covering the period beginning July 1 and ending December 31, which shall be filed no later than January 31 of the following calendar year; or

(B) monthly reports in all calendar years which shall be filed no later than the 20th day after the last day of the month and shall be complete as of the last day of the month, except that, in lieu of filing the reports otherwise due in November and December of any year in which a regularly scheduled general election is held, a pre-general election report shall be filed in accordance with paragraph (2)(A)(i), a post-general election report shall be filed in accordance with paragraph (2)(A)(ii), and a year end report shall be filed no later than January 31 of the following calendar year.

Notwithstanding the preceding sentence, a national committee of a political party shall file the reports required under subparagraph (B).

(5) If a designation, report, or statement filed pursuant to this Act (other than under paragraph (2)(A)(i) or (4)(A)(ii) or subsection (g)(1) of this section) is sent by registered mail, certified mail, priority mail having a delivery confirmation, or express mail having a delivery confirmation, the United States postmark shall be considered the date of filing the designation, report or statement. If a designation, report or statement filed pursuant to this Act (other than under paragraph (2)(A)(i) or (4)(A)(ii), or subsection (g)(1) of this section) is sent by an overnight delivery service with an on-line tracking system, the date on the proof of delivery to the delivery service shall be considered the date of filing of the designation, report, or statement.

(6) (A) The principal campaign committee of a candidate shall notify the Secretary or the Commission, and the Secretary of State, as appropriate, in writing, of any contribution of $ 1,000 or more received by any authorized committee of such candidate after the 20th day, but more than 48 hours before, any election. This notification shall be made within 48 hours after the receipt of such contribution and shall include the name of the candidate and the office sought by the candidate, the identification of the contributor, and the date of receipt and amount of the contribution.

(B) Notification of expenditure from personal funds

(i) Definition of expenditure from personal funds. In this subparagraph, the term "expenditure from personal funds" means –

(I) an expenditure made by a candidate using personal funds; and

(II) a contribution or loan made by a candidate using personal funds or a loan secured using such funds to the candidate's authorized committee.

(ii) Declaration of intent. Not later than the date that is 15 days after the date on which an individual becomes a candidate for the office of Senator, the candidate shall file a declaration stating the total amount of expenditures from personal funds that the candidate intends to make, or to obligate to make, with respect to the election that will exceed the State-by-State competitive and fair campaign formula with –

(I) the Commission; and

(II) each candidate in the same election.

(iii) Initial notification. Not later than 24 hours after a candidate described in clause (ii) makes or obligates to make an aggregate amount of expenditures from personal funds in excess of 2 times the threshold amount in connection with any election, the candidate shall file a notification with –

(I) the Commission; and

(II) each candidate in the same election.

(iv) Additional notification. After a candidate files an initial notification under clause (iii), the candidate shall file an additional notification each time expenditures from personal funds are made or obligated to be made in an aggregate amount that exceed [exceeds] $ 10,000 with –

(I) the Commission; and

(II) each candidate in the same election.

Such notification shall be filed not later than 24 hours after the expenditure is made.

(v) Contents. A notification under clause (iii) or (iv) shall include –

(I) the name of the candidate and the office sought by the candidate;

(II) the date and amount of each expenditure; and

(III) the total amount of expenditures from personal funds that the candidate has made, or obligated to make, with respect to an election as of the date of the expenditure that is the subject of the notification.

(C) Notification of disposal of excess contributions. In the next regularly scheduled report after the date of the election for which a candidate seeks

nomination for election to, or election to, Federal office, the candidate or the candidate's authorized committee shall submit to the Commission a report indicating the source and amount of any excess contributions (as determined under paragraph (1) of section 315(i) [2 USCS § 441a(i)]) and the manner in which the candidate or the candidate's authorized committee used such funds.

(D) Enforcement. For provisions providing for the enforcement of the reporting requirements under this paragraph, see section 309 [2 USCS § 437g].

(E) The notification required under this paragraph shall be in addition to all other reporting requirements under this Act.

(7) The reports required to be filed by this subsection shall be cumulative during the calendar year to which they relate, but where there has been no change in an item reported in a previous report during such year, only the amount need be carried forward.

(8) The requirement for a political committee to file a quarterly report under paragraph (2)(A)(iii) or paragraph (4)(A)(i) shall be waived if such committee is required to file a pre-election report under paragraph (2)(A)(i), or paragraph (4)(A)(ii) during the period beginning on the 5th day after the close of the calendar quarter and ending on the 15th day after the close of the calendar quarter.

(9) The Commission shall set filing dates for reports to be filed by principal campaign committees of candidates seeking election, or nomination for election, in special elections and political committees filing under paragraph (4)(A) which make contributions to or expenditures on behalf of a candidate or candidates in special elections. The Commission shall require no more than one pre-election report for each election and one post-election report for the election which fills the vacancy. The Commission may waive any reporting obligation of committees required to file for special elections if any report required by paragraph (2) or (4) is required to be filed within 10 days of a report required under this subsection. The Commission shall establish the reporting dates within 5 days of the setting of such election and shall publish such dates and notify the principal campaign committees of all candidates in such election of the reporting dates.

(10) The treasurer of a committee supporting a candidate for the office of Vice President (other than the nominee of a political party) shall file reports in accordance with paragraph (3).

(11)(A) The Commission shall promulgate a regulation under which a person required to file a designation, statement, or report under this Act –

(i) is required to maintain and file a designation, statement, or report for any calendar year in electronic form accessible by computers if the person has, or has reason to expect to have, aggregate

contributions or expenditures in excess of a threshold amount determined by the Commission; and

(ii) may maintain and file a designation, statement, or report in electronic form or an alternative form if not required to do so under the regulation promulgated under clause (i).

(B) The Commission shall make a designation, statement, report, or notification that is filed with the Commission under this Act available for inspection by the public in the offices of the Commission and accessible to the public on the Internet not later than 48 hours (or not later than 24 hours in the case of a designation, statement, report, or notification filed electronically) after receipt by the Commission.

(C) In promulgating a regulation under this paragraph, the Commission shall provide methods (other than requiring a signature on the document being filed) for verifying designations, statements, and reports covered by the regulation. Any document verified under any of the methods shall be treated for all purposes (including penalties for perjury) in the same manner as a document verified by signature.

(D) As used in this paragraph, the term "report" means, with respect to the Commission, a report, designation, or statement required by this Act to be filed with the Commission.

(12) Software for filing of reports.

(A) In general. The Commission shall –

(i) promulgate standards to be used by vendors to develop software that –

(I) permits candidates to easily record information concerning receipts and disbursements required to be reported under this Act at the time of the receipt or disbursement;

(II) allows the information recorded under subclause (I) to be transmitted immediately to the Commission; and

(III) allows the Commission to post the information on the Internet immediately upon receipt; and

(ii) make a copy of software that meets the standards promulgated under clause (i) available to each person required to file a designation, statement, or report in electronic form under this Act.

(B) Additional information. To the extent feasible, the Commission shall require vendors to include in the software developed under the standards under subparagraph (A) the ability for any person to file any designation, statement, or report required under this Act in electronic form.

(C) Required use. Notwithstanding any provision of this Act relating to times for filing reports, each candidate for Federal office (or that candidate's authorized committee) shall use software that meets the standards promulgated under this paragraph once such software is made available to such candidate.

(D) Required posting. The Commission shall, as soon as practicable, post on the Internet any information received under this paragraph.

(b) Contents of report. Each report under this section shall disclose –

(1) the amount of cash on hand at the beginning of the reporting period;

(2) for the reporting period and the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office), the total amount of all receipts, and the total amount of all receipts in the following categories:

(A) contributions from persons other than political committees;

(B) for an authorized committee, contributions from the candidate;

(C) contributions from political party committees;

(D) contributions from other political committees;

(E) for an authorized committee, transfers from other authorized committees of the same candidate;

(F) transfers from affiliated committees and, where the reporting committee is a political party committee, transfers from other political party

committees, regardless of whether such committees are affiliated;

(G) for an authorized committee, loans made by or guaranteed by the candidate;

(H) all other loans;

(I) rebates, refunds, and other offsets to operating expenditures;

(J) dividends, interest, and other forms of receipts; and

(K) for an authorized committee of a candidate for the office of President, Federal funds received under chapter 95 and chapter 96 of the Internal Revenue Code of 1954 [1986] [26 USCS §§ 9001 et seq. and 9031 et seq.]

(3) the identification of each –

(A) person (other than a political committee) who makes a contribution to the reporting committee during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of $ 200 within the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office), or in any lesser amount if the reporting committee should so elect, together with the date and amount of any such contribution;

(B) political committee which makes a contribution to the reporting committee during the

reporting period, together with the date and amount of any such contribution;

(C) authorized committee which makes a transfer to the reporting committee;

(D) affiliated committee which makes a transfer to the reporting committee during the reporting period and, where the reporting committee is a political party committee, each transfer of funds to the reporting committee from another political party committee, regardless of whether such committees are affiliated, together with the date and amount of such transfer;

(E) person who makes a loan to the reporting committee during the reporting period, together with the identification of any endorser or guarantor of such loan, and the date and amount or value of such loan;

(F) person who provides a rebate, refund, or other offset to operating expenditures to the reporting committee in an aggregate amount or value in excess of $ 200 within the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office), together with the date and amount of such receipt; and

(G) person who provides any dividend, interest, or other receipt to the reporting committee in an aggregate value or amount in excess of $ 200 within the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal

office), together with the date and amount of any such receipt;

(4) for the reporting period and the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office), the total amount of all disbursements, and all disbursements in the following categories:

(A) expenditures made to meet candidate or committee operating expenses;

(B) for authorized committees, transfers to other committees authorized by the same candidate;

(C) transfers to affiliated committees and, where the reporting committee is a political party committee, transfers to other political party committees, regardless of whether they are affiliated;

(D) for an authorized committee, repayment of loans made by or guaranteed by the candidate;

(E) repayment of all other loans;

(F) contribution refunds and other offsets to contributions;

(G) for an authorized committee, any other disbursements;

(H) for any political committee other than an authorized committee –

(i) contributions made to other political committees;

(ii) loans made by the reporting committees;

(iii) independent expenditures;

(iv) expenditures made under section 315(d) of this Act [2 USCS § 441a(d)]; and

(v) any other disbursements; and

(I) for an authorized committee of a candidate for the office of President, disbursements not subject to the limitation of section 315(b) [2 USCS § 441a(b)];

(5) the name and address of each –

(A) person to whom an expenditure in an aggregate amount or value in excess of $ 200 within the calendar year is made by the reporting committee to meet a candidate or committee operating expense, together with the date, amount, and purpose of such operating expenditure;

(B) authorized committee to which a transfer is made by the reporting committee;

(C) affiliated committee to which a transfer is made by the reporting committee during the reporting period and, where the reporting committee is a political party committee, each transfer of funds by the reporting committee to another political party committee, regardless of whether such committees

are affiliated, together with the date and amount of such transfers;

(D) person who receives a loan repayment from the reporting committee during the reporting period, together with the date and amount of such loan repayment; and

(E) person who receives a contribution refund or other offset to contributions from the reporting committee where such contribution was reported under paragraph (3)(A) of this subsection, together with the date and amount of such disbursement;

(6) (A) for an authorized committee, the name and address of each person who has received any disbursement not disclosed under paragraph (5) in an aggregate amount or value in excess of $ 200 within the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office), together with the date and amount of any such disbursement;

(B) for any other political committee, the name and address of each –

(i) political committee which has received a contribution from the reporting committee during the reporting period, together with the date and amount of any such contribution;

(ii) person who has received a loan from the reporting committee during the reporting

period, together with the date and amount of such loan;

(iii) person who receives any disbursement during the reporting period in an aggregate amount or value in excess of $ 200 within the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office), in connection with an independent expenditure by the reporting committee, together with the date, amount, and purpose of any such independent expenditure and a statement which indicates whether such independent expenditure is in support of, or in opposition to, a candidate, as well as the name and office sought by such candidate, and a certification, under penalty of perjury, whether such independent expenditure is made in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any authorized committee or agent of such committee;

(iv) person who receives any expenditure from the reporting committee during the reporting period in connection with an expenditure under section 315(d) in the Act [2 USCS § 441a(d)], together with the date, amount, and purpose of any such expenditure as well as the name of, and office sought by, the candidate on whose behalf the expenditure is made; and

(v) person who has received any disbursement not otherwise disclosed in this paragraph or paragraph (5) in an aggregate amount or value in

excess of $ 200 within the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office), from the reporting committee within the reporting period, together with the date, amount, and purpose of any such disbursement;

(7) the total sum of all contributions to such political committee, together with the total contributions less offsets to contributions and the total sum of all operating expenditures made by such political committee, together with total operating expenditures less offsets to operating expenditures, for both the reporting period and the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office); and

(8) the amount and nature of outstanding debts and obligations owed by or to such political committee; and where such debts and obligations are settled for less than their reported amount or value, a statement as to the circumstances and conditions under which such debts or obligations were extinguished and the consideration therefor.

(c) Statements by other than political committees; filing; contents; indices of expenditures.

(1) Every person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of $ 250 during a calendar year shall file a statement containing the information required under subsection (b)(3)(A) for all contributions received by such person.

(2) Statements required to be filed by this subsection shall be filed in accordance with subsection (a)(2) of this section, and shall include –

(A) the information required by subsection (b)(6)(B)(iii) of this section, indicating whether the independent expenditure is in support of, or in opposition to, the candidate involved;

(B) under penalty of perjury, a certification whether or not such independent expenditure is made in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate; and

(C) the identification of each person who made a contribution in excess of $ 200 to the person filing such statement which was made for the purpose of furthering an independent expenditure.

(3) The Commission shall be responsible for expeditiously preparing indices which set forth, on a candidate-by-candidate basis, all independent expenditures separately, including those reported under subsection (b)(6)(B)(iii) of this section, made by or for each candidate, as reported under this subsection, and for periodically publishing such indices on a timely pre-election basis.

(d) Filing by facsimile device or electronic mail

(1) Any person who is required to file a statement under subsection (c) or (g) of this section, except statements required to be filed electronically pursuant to subsection (a)(11)(A)(i) of this section

may file the statement by facsimile device or electronic mail, in accordance with such regulations as the Commission may promulgate.

(2) The Commission shall make a document which is filed electronically with the Commission pursuant to this paragraph accessible to the public on the Internet not later than 24 hours after the document is received by the Commission.

(3) In promulgating a regulation under this paragraph, the Commission shall provide methods (other than requiring a signature on the document being filed) for verifying the documents covered by the regulation. Any document verified under any of the methods shall be treated for all purposes (including penalties for perjury) in the same manner as a document verified by signature.

(e) Political committees.

(1) National and congressional political committees. The national committee of a political party, any national congressional campaign committee of a political party, and any subordinate committee of either, shall report all receipts and disbursements during the reporting period.

(2) Other political committees to which section 323 [2 USCS § 441i] applies.

(A) In general. In addition to any other reporting requirements applicable under this Act, a political committee (not described in paragraph (1)) to which section 323(b)(1) [2 USCS § 441i(b)(1)] applies

shall report all receipts and disbursements made for activities described in section 301(20)(A) [2 USCS § 431(20)(A)], unless the aggregate amount of such receipts and disbursements during the calendar year is less than $ 5,000.

(B) Specific disclosure by State and local parties of certain non-Federal amounts permitted to be spent on Federal election activity. Each report by a political committee under subparagraph (A) of receipts and disbursements made for activities described in section 301(20)(A) [2 USCS § 431(20)(A)] shall include a disclosure of all receipts and disbursements described in section 323(b)(2)(A) and (B) [2 USCS § 441i(b)(2)(A) and (B)].

(3) Itemization. If a political committee has receipts or disbursements to which this subsection applies from or to any person aggregating in excess of $ 200 for any calendar year, the political committee shall separately itemize its reporting for such person in the same manner as required in paragraphs (3)(A), (5), and (6) of subsection (b).

(4) Reporting periods. Reports required to be filed under this subsection shall be filed for the same time periods required for political committees under subsection (a)(4)(B).

(f) Disclosure of electioneering communications.

(1) Statement required. Every person who makes a disbursement for the direct costs of producing and airing electioneering communications in

an aggregate amount in excess of $ 10,000 during any calendar year shall, within 24 hours of each disclosure date, file with the Commission a statement containing the information described in paragraph (2).

(2) Contents of statement. Each statement required to be filed under this subsection shall be made under penalty of perjury and shall contain the following information:

(A) The identification of the person making the disbursement, of any person sharing or exercising direction or control over the activities of such person, and of the custodian of the books and accounts of the person making the disbursement.

(B) The principal place of business of the person making the disbursement, if not an individual.

(C) The amount of each disbursement of more than $ 200 during the period covered by the statement and the identification of the person to whom the disbursement was made.

(D) The elections to which the electioneering communications pertain and the names (if known) of the candidates identified or to be identified.

(E) If the disbursements were paid out of a segregated bank account which consists of funds contributed solely by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C.

1101(a)(20))) directly to this account for electioneering communications, the names and addresses of all contributors who contributed an aggregate amount of $ 1,000 or more to that account during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. Nothing in this subparagraph is to be construed as a prohibition on the use of funds in such a segregated account for a purpose other than electioneering communications.

(F) If the disbursements were paid out of funds not described in subparagraph (E), the names and addresses of all contributors who contributed an aggregate amount of $ 1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date.

(3) Electioneering communication. For purposes of this subsection –

(A) In general.

(i) The term "electioneering communication" means any broadcast, cable, or satellite communication which –

(I) refers to a clearly identified candidate for Federal office;

(II) is made within –

(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

(ii) If clause (i) is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term "electioneering communication" means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate. Nothing in this subparagraph shall be construed to affect the interpretation or application of section 100.22(b) of title 11, Code of Federal Regulations.

(B) Exceptions. The term "electioneering communication" does not include –

(i) a communication appearing in a news story, commentary, or editorial distributed

through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(ii) a communication which constitutes an expenditure or an independent expenditure under this Act;

(iii) a communication which constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or

(iv) any other communication exempted under such regulations as the Commission may promulgate (consistent with the requirements of this paragraph) to ensure the appropriate implementation of this paragraph, except that under any such regulation a communication may not be exempted if it meets the requirements of this paragraph and is described in section 301(20)(A)(iii) [2 USCS § 431(20)(A)(iii)].

(C) Targeting to relevant electorate. For purposes of this paragraph, a communication which refers to a clearly identified candidate for Federal office is "targeted to the relevant electorate" if the communication can be received by 50,000 or more persons –

(i) in the district the candidate seeks to represent, in the case of a candidate for Representative

in, or Delegate or Resident Commissioner to, the Congress; or

(ii) in the State the candidate seeks to represent, in the case of a candidate for Senator.

(4) Disclosure date. For purposes of this subsection, the term "disclosure date" means –

(A) the first date during any calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $ 10,000; and

(B) any other date during such calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $ 10,000 since the most recent disclosure date for such calendar year.

(5) Contracts to disburse. For purposes of this subsection, a person shall be treated as having made a disbursement if the person has executed a contract to make the disbursement.

(6) Coordination with other requirements. Any requirement to report under this subsection shall be in addition to any other reporting requirement under this Act.

(7) Coordination with Internal Revenue Code. Nothing in this subsection may be construed to establish, modify, or otherwise affect the definition

of political activities or electioneering activities (including the definition of participating in, intervening in, or influencing or attempting to influence a political campaign on behalf of or in opposition to any candidate for public office) for purposes of the Internal Revenue Code of 1986 [26 USCS §§ 1 et seq.].

(g) Time for reporting certain expenditures.

(1) Expenditures aggregating $ 1,000.

(A) Initial report. A person (including a political committee) that makes or contracts to make independent expenditures aggregating $ 1,000 or more after the 20th day, but more than 24 hours, before the date of an election shall file a report describing the expenditures within 24 hours.

(B) Additional reports. After a person files a report under subparagraph (A), the person shall file an additional report within 24 hours after each time the person makes or contracts to make independent expenditures aggregating an additional $ 1,000 with respect to the same election as that to which the initial report relates.

(2) Expenditures aggregating $ 10,000.

(A) Initial report. A person (including a political committee) that makes or contracts to make independent expenditures aggregating $ 10,000 or more at any time up to and including the 20th day before the date of an election shall file a report describing the expenditures within 48 hours.

(B) Additional reports. After a person files a report under subparagraph (A), the person shall file an additional report within 48 hours after each time the person makes or contracts to make independent expenditures aggregating an additional $ 10,000 with respect to the same election as that to which the initial report relates.

(3) Place of filing; contents. A report under this subsection –

(A) shall be filed with the Commission; and

(B) shall contain the information required by subsection (b)(6)(B)(iii) of this section, including the name of each candidate whom an expenditure is intended to support or oppose.

(4) Time of filing for expenditures aggregating $ 1,000. Notwithstanding subsection (a)(5), the time at which the statement under paragraph (1) is received by the Commission or any other recipient to whom the notification is required to be sent shall be considered the time of filing of the statement with the recipient.

(h) Reports from Inaugural Committees. The Federal Election Commission shall make any report filed by an Inaugural Committee under section 510 of title 36, United States Code, accessible to the public at the offices of the Commission and on the Internet not later than 48 hours after the report is received by the Commission.

(i) Disclosure of bundled contributions.

(1) Required disclosure. Each committee described in paragraph (6) shall include in the first report required to be filed under this section after each covered period (as defined in paragraph (2)) a separate schedule setting forth the name, address, and employer of each person reasonably known by the committee to be a person described in paragraph (7) who provided 2 or more bundled contributions to the committee in an aggregate amount greater than the applicable threshold (as defined in paragraph (3)) during the covered period, and the aggregate amount of the bundled contributions provided by each such person during the covered period.

(2) Covered period. In this subsection, a "covered period" means, with respect to a committee –

(A) the period beginning January 1 and ending June 30 of each year;

(B) the period beginning July 1 and ending December 31 of each year; and

(C) any reporting period applicable to the committee under this section during which any person described in paragraph (7) provided 2 or more bundled contributions to the committee in an aggregate amount greater than the applicable threshold.

(3) Applicable threshold.

(A) In general. In this subsection, the "applicable threshold" is $ 15,000, except that in

determining whether the amount of bundled contributions provided to a committee by a person described in paragraph (7) exceeds the applicable threshold, there shall be excluded any contribution made to the committee by the person or the person's spouse.

(B) Indexing. In any calendar year after 2007, section 315(c)(1)(B) [2 USCS § 441a(c)(1)(B)] shall apply to the amount applicable under subparagraph (A) in the same manner as such section applies to the limitations established under subsections (a)(1)(A), (a)(1)(B), (a)(3), and (h) of such section, except that for purposes of applying such section to the amount applicable under subparagraph (A), the "base period" shall be 2006.

(4) Public availability. The Commission shall ensure that, to the greatest extent practicable –

(A) information required to be disclosed under this subsection is publicly available through the Commission website in a manner that is searchable, sortable, and downloadable; and

(B) the Commission's public database containing information disclosed under this subsection is linked electronically to the websites maintained by the Secretary of the Senate and the Clerk of the House of Representatives containing information filed pursuant to the Lobbying Disclosure Act of 1995.

(5) Regulations. Not later than 6 months after the date of enactment of the Honest Leadership and

Open Government Act of 2007 [enacted Sept. 14, 2007], the Commission shall promulgate regulations to implement this subsection. Under such regulations, the Commission –

(A) may, notwithstanding paragraphs (1) and (2), provide for quarterly filing of the schedule described in paragraph (1) by a committee which files reports under this section more frequently than on a quarterly basis;

(B) shall provide guidance to committees with respect to whether a person is reasonably known by a committee to be a person described in paragraph (7), which shall include a requirement that committees consult the websites maintained by the Secretary of the Senate and the Clerk of the House of Representatives containing information filed pursuant to the Lobbying Disclosure Act of 1995;

(C) may not exempt the activity of a person described in paragraph (7) from disclosure under this subsection on the grounds that the person is authorized to engage in fundraising for the committee or any other similar grounds; and

(D) shall provide for the broadest possible disclosure of activities described in this subsection by persons described in paragraph (7) that is consistent with this subsection.

(6) Committees described. A committee described in this paragraph is an authorized committee

of a candidate, a leadership PAC, or a political party committee.

(7) Persons described. A person described in this paragraph is any person, who, at the time a contribution is forwarded to a committee as described in paragraph (8)(A)(i) or is received by a committee as described in paragraph (8)(A)(ii), is –

(A) a current registrant under section 4(a) of the Lobbying Disclosure Act of 1995 [2 USCS § 1603(a)];

(B) an individual who is listed on a current registration filed under section 4(b)(6) of such Act [2 USCS § 1603(b)(6)]or a current report under section 5(b)(2)(C) of such Act [2 USCS § 1604(b)(2)(C)]; or

(C) a political committee established or controlled by such a registrant or individual.

(8) Definitions. For purposes of this subsection, the following definitions apply:

(A) Bundled contribution. The term "bundled contribution" means, with respect to a committee described in paragraph (6) and a person described in paragraph (7), a contribution (subject to the applicable threshold) which is –

(i) forwarded from the contributor or contributors to the committee by the person; or

(ii) received by the committee from a contributor or contributors, but credited by the committee or candidate involved (or, in the case of a

leadership PAC, by the individual referred to in subparagraph (B) involved) to the person through records, designations, or other means of recognizing that a certain amount of money has been raised by the person.

(B) Leadership PAC. The term "leadership PAC" means, with respect to a candidate for election to Federal office or an individual holding Federal office, a political committee that is directly or indirectly established, financed, maintained or controlled by the candidate or the individual but which is not an authorized committee of the candidate or individual and which is not affiliated with an authorized committee of the candidate or individual, except that such term does not include a political committee of a political party.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SPEECHNOW.ORG, et al., Appellants, v. FEDERAL ELECTION COMMISSION, Appellee.	No. 08-5223, et al.

Wednesday, January 27, 2010

Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE:

CHIEF JUDGE DAVID B. SENTELLE AND CIRCUIT JUDGES DOUGLAS H. GINSBURG, KAREN LECRAFT HENDERSON, JUDITH W. ROGERS, DAVID S. TATEL, MERRICK B. GARLAND, JANICE ROGERS BROWN, THOMAS B. GRIFFITH AND BRETT M. KAVANAUGH

APPEARANCES:

ON BEHALF OF THE APPELLANTS:

STEVEN M. SIMPSON, ESQUIRE

ON BEHALF OF THE APPELLEE:

DAVID KOLKER, ESQUIRE

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[3] PROCEEDINGS

THE CLERK: Case number 08-5223, et al., Speechnow.org, et al., Appellants v. Federal Election Commission. Mr. Simpson for the Appellants; Mr. Kolker for the Appellee.

JUDGE SENTELLE: Mr. Simpson. What can you add to what Justice Kennedy said, Mr. Simpson?

ORAL ARGUMENT OF
STEVEN M. SIMPSON, ESQ.
ON BEHALF OF THE APPELLANTS

MR. SIMPSON: Your Honor, I'm not sure I can add a lot, and as Your Honor recognized just last week the Supreme Court held in the *Citizens United* decision that corporations care now entitled to make unlimited expenditures, independent expenditures without having to spend that money through the burdensome mechanism of setting up a separate pact.

As Your Honors know from the briefs, our position is based on a simple and straightforward opposition. If individuals are entitled to make unlimited independent expenditures of their speech they must be entitled to join with other individuals in association and spend precisely the same amounts of money as a group as they would be able to do as individuals.

Now that the Supreme Court has held that corporations may do that, Your Honors, we believe that the exact same rule must apply to groups like Speechnow, which is [4] an unincorporated association. To quote from the Supreme Court's decision last week, this is from page 33 of the slip opinion, Your Honors, "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens for simply engaging in political speech." Your Honors, we think that that, and the rest of the Supreme Court's decision makes clear that the arguments we've made in the briefs that the basic principles that the three-judge panel in this Court relied on in *Emily's List* apply with full force to Speechnow, and mean that this Court should rule in Speechnow's favor and reject the FEC's arguments.

Now, Your Honors, obviously, the *Citizens United* decision has a profound impact on this case, so if you'll permit me I'd like to turn to the decision and discuss a bit about what the decision did, and why we think it mandates a ruling in our favor.

Your Honors, I think that the first and foremost the simplest way to understand why *Citizens United* is on all fours with this case, and why we prevail under *Citizens United* is the simple fact that the core holding in the Supreme Court's decision was that corporations cannot be required to set up separate pacts in order to make their independent expenditures. They cannot be required to do what the Supreme Court saw, and we argued in our briefs is an enormously burdensome alternative to being able to speak without [5] regulation, that is set up a pact and run all of your expenditures through that pact. Your Honors, the FEC in this case is arguing that Speechnow must be required to do precisely the same thing, exactly what the Supreme Court just said one week ago, corporations couldn't be required to do. The FEC's position here is Speechnow, simply because it is associating together must set up a pact and do what corporations cannot be required to do.

JUDGE GINSBURG: Well, that was the FEC's position in a brief written before it had the benefit of the *Citizens United* case.

MR. SIMPSON: That's right.

JUDGE GINSBURG: So, what the Commission is actually going to be saying today may be somewhat different, and I'm sure you will be prepared to respond to it. You might –

JUDGE SENTELLE: Yes.

JUDGE GINSBURG: – want to save some time.

JUDGE SENTELLE: You may want to save some time, a good bit of time.

MR. SIMPSON: Your Honor, I'm more than happy to reserve the balance of my time if the Court –

JUDGE GINSBURG: Well, if you want to address the disclosure issues this might be a good time.

MR. SIMPSON: Sure, Your Honor. I mean, the disclosure issues I think in this case, in our case are on all [6] fours with precisely what the Supreme Court just ruled in *Citizens United.* In other words, the Court held that the Government's interest in disclosure in *Citizens United* will be adequately served through the disclosure mechanism of 434(f). We are arguing, in this case, not against disclosure at all, we are simply arguing that precisely the same sort of disclosure provisions should apply to Speechnow, and that the provisions of 434(c), which are substantially similar to 1434(f) are adequate to address the Government's interest in disclosure in this case.

Indeed, Your Honor, the precise disclosure provision at issue in *Citizens United* was 434(f). The reason being that the event or the speech that triggered the entire issue in *Citizens United* was electioneering communications. And electioneering communications are disclosed under 434(f). But as Your Honors probably are aware the Supreme Court addressed not only

electioneering communications, but independent expenditures in general, which are simply expenditures for expressed advocacy. Corporations are prevented from engaging in independent expenditures, as well.

Presumably after the Supreme Court's decision last week if a corporation makes an independent expenditure that's not an electioneering communication, that is it's not within the 30 or 60-day window, and it's not a broadcast communication, it's just a general independent expenditure, [7] 434(c) is the provision that corporations will disclose under, that is the precise provision in this case the Court said it should –

JUDGE KAVANAUGH: The Court didn't say that was the limit of the disclosure obligations that could be imposed.

MR. SIMPSON: I'm sorry?

JUDGE KAVANAUGH: The Court did not say that that was the limit to what the Government can do in terms of imposing disclosure obligations.

MR. SIMPSON: It didn't say that that was the limit, Your Honor, it didn't use those words, but by implication the fact that it focused on the pact requirement as a burdensome requirement that amounted along with 441(b) to a ban on speech, that is it was not an adequate alternative for speech, at least insofar as the FEC's argument here is concerned, I think addresses that argument.

JUDGE KAVANAUGH: What's the precise additional burden that would be imposed by doing the

forms that are at issue here, I guess the Form 1 and the Form 3X schedules?

MR. SIMPSON: Your Honor, the burdens that the Supreme Court was talking about go well beyond simply disclosure, or the disclosure forms that one uses. The disclosure, the Form 3X, that is the proper disclosure form to use for a pact, a political committee, is far more detailed and burdensome, it requires in effect tracking –

[8] JUDGE KAVANAUGH: Is it just the time? It'll take more time?

MR. SIMPSON: No, Your Honor, not at all. I mean, it's a step back. I think our argument ultimately is precisely the point the Supreme Court made in *Citizens United.* In other words, we aren't saying that it's just a matter of filling out a precise form and that one form is more burdensome than another, we are saying that the entire mechanism of having to spend through a pact, create a separate pact, become an entirely different type of organization, appoint a treasurer, have to forward –

JUDGE KAVANAUGH: That's really getting around the question. The question should be what exactly about these forms and these disclosure obligations is so burdensome as to violate the First Amendment, even though the Supreme Court has repeatedly upheld disclosure obligations of a variety of kinds?

MR. SIMPSON: Well, Your Honor, I think that ultimately it's the overall burden of pacts. So, I don't think it's appropriate to say, to focus –

JUDGE TATEL: Can I just ask you precisely about Judge Kavanaugh's question, and about this Form 3X? If, as you say in your governing documents and in your proposed findings of fact, that Speechnow does not provide funding to political parties, doesn't make direct expenditures, doesn't [9] do loans, you don't do any of that, right? Just independent expenditures.

MR. SIMPSON: That's correct.

JUDGE TATEL: Okay. Then you don't give to candidates (indiscernible). Then it looks to me like you'll only have to fill out Schedule A which is contributions, and B which is disbursements. And those are exactly like A and E of Form 5, so where's the additional burden?

MR. SIMPSON: Your Honor, the additional burden goes beyond just the precise forms that we have to fill out.

JUDGE TATEL: Well, but do you agree it's the same?

MR. SIMPSON: I'm sorry, I didn't hear that.

JUDGE TATEL: Do you agree with me that, is there any reason – do you agree with my

question, that is that filling out the Form 3X isn't any different – –

MR. SIMPSON: I don't think that –

JUDGE TATEL: – than the forms you now have to fill out?

MR. SIMPSON: Your Honor, assuming somebody with knowledge that already understands that –

JUDGE TATEL: Well, I just asked you about the two, I just asked you about the specific schedules, the two forms, and to me they look identical, and I'm just curious as to whether that's correct or now, because if I'm correct then it seems to me the burden is exactly the same, which is I think [10] what Judge Kavanaugh was getting at.

MR. SIMPSON: Your Honor, the forms are very similar, but I don't think it's appropriate then to conclude from that that the burden is the same.

JUDGE TATEL: Why?

JUDGE SENTELLE: What is the additional burden?

MR. SIMPSON: What –

JUDGE SENTELLE: Yes. What is the additional burden?

MR. SIMPSON: It's the additional burden that the Supreme Court talked about, having to plow

through hundreds of rules to decide all of your obligations. I mean, that can't be ignored from the Supreme Court's case. This Court should in our view –

JUDGE SENTELLE: What's the difference in the A and D forms that Judge Tatel was asking you about –

MR. SIMPSON: Your Honor, I think they're –

JUDGE SENTELLE: – as far as obligation –

MR. SIMPSON: I'm sorry.

JUDGE SENTELLE: – as far as the obligation imposed upon the reporter?

MR. SIMPSON: The ultimate form for, it's Form 3X for political committees is far more detailed, so –

JUDGE TATEL: But I just, the question I just asked you was for Speechnow it looks to me like it's identical to [11] the form you already agree you have no objection to filling out.

MR. SIMPSON: Your Honor, I think they are substantially the same, so I do –

JUDGE TATEL: All right.

MR. SIMPSON: – agree with that point.

JUDGE TATEL: Okay.

MR. SIMPSON: I'm not saying

JUDGE TATEL: So, to me it looks like the only (difference is a treasurer, you have to have a treasurer and a bank account.

MR. SIMPSON: Well, that's one difference, Your Honor.

JUDGE TATEL: Are there any others?

MR. SIMPSON: I'm sorry?

JUDGE TATEL: What are they? What are the other differences?

MR. SIMPSON: The other difference is the overall regulatory burden. I think the Court –

JUDGE SENTELLE: That's not answering this question.

MR. SIMPSON: Okay.

JUDGE SENTELLE: Don't tell us about overall burdens –

MR. SIMPSON: Sure.

JUDGE SENTELLE: – tell us about what the [12] additional burden is –

MR. SIMPSON: It's appointing a treasurer –

JUDGE SENTELLE: – in this reporting requirement.

MR. SIMPSON: Sure, Your Honor. It is appointing a treasurer, it's having to forward all receipts to the treasurer within a certain amount of time, it is having to –

JUDGE TATEL: Don't you have to do that under existing regulations?

MR. SIMPSON: No, Your Honor. Not if it's not a political committee it doesn't have to.

JUDGE GINSBURG: Are you subject to the reporting in 26 U.S.C. 527?

MR. SIMPSON: Yes, Your Honor.

JUDGE GINSBURG: Doesn't that – that's an IRS report?

MR. SIMPSON: That is –

JUDGE GINSBURG: Doesn't that cover –

MR. SIMPSON: – a substantial –

JUDGE GINSBURG: – most of this, as well?

MR. SIMPSON: I'm sorry?

JUDGE GINSBURG: Doesn't that require much of the same information?

MR. SIMPSON: It does, Your Honor. But two –

JUDGE GINSBURG: Okay, so you have to give it to the IRS?

[13] MR. SIMPSON: Yes.

JUDGE GINSBURG: The additional of burden of giving it to the FEC is what?

MR. SIMPSON: The additional burden of being a political committee under the FEC is the time that it takes to set up the committee, importantly, Your Honor, the fact that it is –

JUDGE GINSBURG: Your committee has been set up.

MR. SIMPSON: Well, none of the – the pact has not been set up.

JUDGE SENTELLE: Yes.

MR. SIMPSON: That's –

JUDGE SENTELLE: We're asking you not about the setting up but about the reporting requirements. Just narrow yourself to the –

MR. SIMPSON: Okay.

JUDGE SENTELLE: – reporting requirements.

MR. SIMPSON: Then that's right. Yes.

JUDGE SENTELLE: Don't tell us about any overall burdens or –

MR. SIMPSON: Certainly.

JUDGE SENTELLE: – about any setting up committees.

MR. SIMPSON: Okay.

JUDGE SENTELLE: You have an organization.

MR. SIMPSON: Yes.

[14] JUDGE SENTELLE: You say you don't have to be a pact, okay, that's a different question.

MR. SIMPSON: All right.

JUDGE SENTELLE: You don't have to be a pact. Assume you don't have to be a pact, assume you've won that part –

MR. SIMPSON: Okay.

JUDGE SENTELLE: – and we're just talking about whether you're nonetheless required under the reporting requirements.

MR. SIMPSON: Then in that respective, the direct answer to Judge Ginsburg's question is they are substantially similar, especially if you look at 527.

JUDGE SENTELLE: So, just calling you a pact –

JUDGE GINSBURG: Okay.

JUDGE SENTELLE: – and not making you do anything except the reporting is not really going to impose an additional burden on you, right? If everything else unconstitutional except that, the reporting requirement by itself –

MR. SIMPSON: I think that's true. Yes.

JUDGE GINSBURG: Okay. Let's go on to when you have to, when you become subject to this.

MR. SIMPSON: So, the other burdens then.

JUDGE GINSBURG: Yes. Well, you know, your argument [15] that none of this kicks in until you expend your $1,000.

MR. SIMPSON: I'm sorry, I didn't hear that.

JUDGE GINSBURG: If I recall your argument that you're not subject to any of these requirements until you've expended the $1,000.

MR. SIMPSON: That's true, as a political committee, that's when political committee status kicks in, that is when Speechnow spends $1,000 for express advocacy it becomes a political committee. Now, the additional burdens, if I may –

JUDGE GINSBURG: Well, actually, I think isn't that an issue as to whether it's going to, it spends the money, or when it receives the money?

MR. SIMPSON: Well, that's true, Your Honor. And our fifth question is the question of when we would have to register as a political committee if the Court held that we had to become a political committee.

JUDGE GINSBURG: And you're saying only when you expend the money?

MR. SIMPSON: Yes, Your Honor, exactly.

JUDGE GINSBURG: And the Government says when you receive the money.

MR. SIMPSON: Not when we just receive the money, Your Honor. And I think that gets to another point –

JUDGE GINSBURG: So, what's the additional problem about complying once you receive the money, as opposed to [16] waiting until you've expended it?

MR. SIMPSON: Your Honor, if you simply are isolating this on the disclosure form basis it probably isn't a substantially different burden. So, I want to answer the Court's question, I don't want to go beyond that, but if we're solely looking at the precise forms, and we assume that a person knows exactly what forms to fill out, then I think from that point it's not tremendously burdensome. But the overall question is making somebody a political committee when they haven't even engaged in speech means they have to comply with all of the other burdens before knowing if they're even going to be able to raise enough money to make their advertising. That's the position that Speechnow is in.

JUDGE GINSBURG: Well, the threshold of $1,000 is the same, is it not, whether you receive it or expend it?

MR. SIMPSON: It is – yes, Your Honor. But, I mean, to put this in the context of Speechnow,

that means as soon as Mr. Keating (phonetic sp.) raises $1,000, even before he knows if he's going to have enough money to make his independent expenditures, which were after all, you know, in the hundreds of thousands of dollars, he has to then form a political committee, and comply with the burdens of political committees without even knowing whether he's actually going to be (indiscernible).

JUDGE GINSBURG: Well, he has, the actual findings [17] here are that you have, and you've represented that you have donors anxious to give various sums of money, including in one instance, $115,000.

MR. SIMPSON: Yes.

JUDGE GINSBURG: So, he knows he's going to get that.

MR. SIMPSON: For these independent expenditures, that's true, Your Honor. That's not necessarily true down the line, and as the Supreme Court made clear in the *Citizens United* decision, one of the problems with pact status is having to wade through all of the regulations that accompany pact status essentially means the ad hoc groups that want to create themselves on the spur of the moment, and –

JUDGE GINSBURG: Well, you're making an as applied challenge here, you're not –

MR. SIMPSON: Yes. Yes.

JUDGE GINSBURG: – an ad hoc group that wants to do something on the spur of the moment.

JUDGE SENTELLE: Right.

MR. SIMPSON: Well, Your Honor, I disagree with that. We were an ad hoc group that did want to do something –

JUDGE SENTELLE: But you're not an ad hoc group any more, you're an organized group that has a name, it's got a board or advisors –

[18] MR. SIMPSON: Well, that's true, Your Honor.

JUDGE SENTELLE: – it has promises.

MR. SIMPSON: But, I mean, that I think, you know, begs the question ultimately, David Keating if he could have avoided precisely the burdens that the Supreme Court talked about last week would not have had to go through all that, wouldn't have had to go to the FEC, make an advisory opinion request and ask them in effect for permission to speak. So, I mean, it is true now, I mean, in a sense Your Honors holding the fact that David Keating has had to endure these burdens and had to do what he's had to do, as the in a sense the answer to the burden question, I think that kind of flips the proper analysis. The question –

JUDGE ROGERS: But you agree, don't you, that under the tax law that you decided you wish

to comply with, you have a lot of things you must do in terms of organization, disclosure, and registration, that kind of –

MR. SIMPSON: No, Your Honor. I mean, I wouldn't agree that they're comparable to becoming a pact.

JUDGE ROGERS: I didn't ask you that.

MR. SIMPSON: Well, then we -- yes, that's true, Your Honor.

JUDGE ROGERS: All right.

MR. SIMPSON: As a 527 they have to –

JUDGE ROGERS: Right.

[19] JUDGE SENTELLE: Yes.

JUDGE ROGERS: And the only other thing you mentioned was burdens in tracking under the FEC regulations, is that correct?

MR. SIMPSON: No, that's not the only other thing we mentioned, Your Honor.

JUDGE ROGERS: But is there any burdens in tracking where you're only doing expressed acts, and you've already indicated that you're only going to accept money from certain types of persons, and you're only going to use it for certain types of things?

MR. SIMPSON: Yes, Your Honor. I mean, the tracking goes to every single penny that David Keating –

JUDGE ROGERS: And what do you mean by tracking?

MR. SIMPSON: I mean that he has to effectively track every penny that he spends for –

JUDGE ROGERS: All right. But –

MR. SIMPSON: – paper, pencils –

JUDGE ROGERS: – don't you have to do that in order to disclose?

MR. SIMPSON: No, Your Honor. I mean, not necessarily, because –

JUDGE ROGERS: If I give you $1,000 how are you going to disclose that I gave you $1,000 unless you have a record?

[20] MR. SIMPSON: That much is clear, Your Honor, if the money is being given to Speechnow for its independent expenditures. That doesn't necessarily mean –

JUDGE ROGERS: But that's, and you said that's all you're going to do?

MR. SIMPSON: That's all we're going to do. That's true, Your Honor. But, I mean, there are other administrative expenses that will accompany

Speechnow as an operating group that Mr. Keating wouldn't have tracked in the –

JUDGE ROGERS: Are you talking about rent, leasing –

MR. SIMPSON: Yes. Yes.

JUDGE ROGERS: – electricity bills, all of that.

MR. SIMPSON: That's true, Your Honor. Yes, that's right. I mean, that –

JUDGE KAVANAUGH: Under your theory couldn't someone donate to Speechnow or to another committee like this and pay for all of the administrative expenses and not be subject to disclosure?

MR. SIMPSON: Not to Speechnow, Your Honor.

JUDGE KAVANAUGH: Let's take it out of Speechnow. So, under your theory, though, of the First Amendment, someone could donate and pay for all the administrative expenses of a group, which are often large, and still evade disclosure, correct?

[21] MR. SIMPSON: Yes, Your Honor. But that is –

JUDGE KAVANAUGH: And isn't that a problem because administrative expenses are often large, and so someone who is paying or picking up all the administrative expenses is going to be someone

that the public would be interested in knowing about, consistent with what the Supreme Court has said about disclosure obligations?

MR. SIMPSON: Your Honor, I don't think it's a problem for the reasons that that's precisely what a corporation can do now. The disclosure that the Supreme Court held as applied to corporations do not require corporations to disclose every administrative expense.

JUDGE TATEL: Suppose it was a foreign contribution for administrative expenses.

MR. SIMPSON: Foreign contributions –

JUDGE TATEL: No one would know.

MR. SIMPSON: I'm sorry?

JUDGE TATEL: The FEC would have no idea of knowing that because it wouldn't be reported.

MR. SIMPSON: That's not true, Your Honor. Well, it is true –

JUDGE TATEL: Under your theory it would not be reported.

MR. SIMPSON: Your Honor, that's not true because Speechnow can't accept foreign contributions, and foreign [22] (indiscernible) –

JUDGE TATEL: Right. But the Government, but the FEC doesn't have to rely on your

government documents, go ahead, you could change them and the FEC would never know.

MR. SIMPSON: Well, but 441(b) would prohibit Speechnow from accepting foreign contributions. So, that's a matter of law now. So, Speechnow can't accept foreign contributions.

JUDGE TATEL: But how would the FEC ever know –

JUDGE SENTELLE: Yes.

JUDGE TATEL: – if you did?

JUDGE SENTELLE: If you don't report how are they going to know you did?

JUDGE TATEL: You don't report it. Right.

MR. SIMPSON: Your Honor, if somebody made a foreign, if a foreign entity made a contribution –

JUDGE TATEL: I mean, if that were a satisfactory answer then we wouldn't really need an IRS, would we?

MR. SIMPSON: It would be disclosed, Your Honor. It would be disclosed –

JUDGE TATEL: How would it be disclosed?

MR. SIMPSON: – under 434(c), just like any other donation to Speechnow that goes to fund its independent expenditures.

JUDGE KAVANAUGH: The hypothetical was funding –

[23]JUDGE TATEL: Right.

JUDGE KAVANAUGH: – the administrative expenses. Judge Tatel's –

MR. SIMPSON: But –

JUDGE KAVANAUGH: – hypothetical.

MR. SIMPSON: – Your Honor, Speechnow can't accept all the –

JUDGE TATEL: That's why it was a hypothetical.

MR. SIMPSON: I mean, Your Honor, I don't know that there is such a group that, I mean, that's the problem with a hypothetical.

JUDGE TATEL: Well, if there's not a group that accepts earmarked administrative expenses, the FEC says half of the expenses of 527s are administrative.

MR. SIMPSON: But, Your Honor, a group unlike Speechnow without Speechnow's bylaws is still prohibited from accepting –

JUDGE TATEL: But you –

MR. SIMPSON: – them under –

JUDGE TATEL: But you could change –

MR. SIMPSON: – 441(b).

JUDGE TATEL: But you could change your bylaws.

MR. SIMPSON: No, the bylaws can't be changed, that's – a prohibition of 441(b) is on, it's in the statute of the law.

[24] JUDGE TATEL: Well, you could ignore your bylaws. Still it's –

MR. SIMPSON: It's not the bylaws, Your Honor, it's the law that prevents either foreign national or –

JUDGE TATEL: You're missing my point. The point is that you could ignore your bylaws and accept an earmarked contribution for administrative expenses from a foreign country, and because you're not reporting them the FEC would never know that.

MR. SIMPSON: Your Honor, if that is true, if that is the premise –

JUDGE TATEL: Right.

MR. SIMPSON: – – then I don't see what political committee status is going to change. If David Keating is really going to violate the law and commit a felony, and a foreign national is also going to commit a felony in accepting these contributions, it's – I don't understand how the additional burden of political committee status is suddenly going to make him into a lawful individual. I mean, if he's prepared to commit a felony in accepting this money, he's certainly prepared to commit a felony in failing to

disclose it. So, adding yet one more law that under the hypothetical this lawless person is going to violate I don't see how that changes anything. I mean –

JUDGE GARLAND: Could I ask you a question about the [25] burden on an ad hoc organization?

MR. SIMPSON: Yes.

JUDGE GARLAND: So, you want to be a 527, right?

MR. SIMPSON: Yes.

JUDGE GARLAND: And you're going to file. How ad hoc can you be if you have to make that filing with the IRS?

MR. SIMPSON: The filings with the IRS only have to happen when an organization is actually engaging in activity. That is, so, for instance, Speechnow, when it makes –

JUDGE GARLAND: It's not going to take that, let's get over the this is not an advance part, let's get past that just for a moment.

MR. SIMPSON: Okay.

JUDGE GARLAND: Imagine, okay, you do want to engage in activity, there's no doubt about that.

MR. SIMPSON: Yes.

JUDGE GARLAND: So, at some point you're going to have to file.

MR. SIMPSON: Yes.

JUDGE GARLAND: So, how much of a burden – and you're talking about the need to wade through a lot of regulations and rules. And in my own experience the IRS has a lot of rules. So, if you're prepared to wade through the 527 rules how much different is it to have to wade through the FICA rules?

[26] MR. SIMPSON: Your Honor, the IRS rules and the forms are very straight forward, they're a lot simpler than the – I mean, they are not as complicated. If you compare the forms –

JUDGE GARLAND: I look at the instructions, they're pretty long, actually.

JUDGE TATEL: Have you looked at the 990?

JUDGE GARLAND: The forms tend to be short, but the instructions are pretty long.

MR. SIMPSON: True, Your Honor, but in order for Speechnow to become a political committee it doesn't just have to look at the disclosure provisions. There are hundreds of rules that apply precisely to political committee status. It is not really possible for a group simply to say going in we already know what the rules say, they have to rule wade through the rules and understand –

JUDGE GARLAND: But they're have to wade through the IRS rules anyway. And so, a normal human being is not going to be able to do either of these two.

JUDGE GINSBURG: No, it's going to require a lawyer.

JUDGE ROGERS: Yes.

JUDGE GARLAND: You're going to need a lawyer, or a treasurer, or something anyway in order to be able to –

JUDGE SENTELLE: A normal lawyer can't get through some of these.

[27] MR. SIMPSON: Well, that may be, Your Honor, but the Supreme Court has never held that having to comply with IRS rules, and be something under the Internal Revenue Code –

JUDGE GARLAND: The IRS hasn't addressed this question at all. So, that's –

MR. SIMPSON: Okay.

JUDGE GARLAND: – why we're here, unfortunately. If they had addressed it we could just cite them and that would be the end of it.

MR. SIMPSON: Your Honor, I think they have addressed it, but –

JUDGE GARLAND: They have addressed the difference between the IRS rules and FICA rules?

MR. SIMPSON: Yes, Your Honor. Not precisely that, but I want to answer your questions, I don't want to jump past that.

JUDGE SENTELLE: Not remotely, though.

MR. SIMPSON: So, I want to make sure I've answered your question.

JUDGE GARLAND: So, there's one more question along this line –

MR. SIMPSON: Sure.

JUDGE GARLAND: – which is you actually get a benefit by being a pact with respect to the IRS. The 527 rules say that they don't apply if you're a political [28] committee.

MR. SIMPSON: That's true.

JUDGE GARLAND: So, you get to avoid all of that. Isn't the elimination of that burden significant also in our analysis?

MR. SIMPSON: I don't think it is, Your Honor, because it's a – I mean, that argument can cut both ways. If we were a 527 we wouldn't have to be, at least under our argument, a pact. But to –

JUDGE GARLAND: By being a pact there's some alleviation of the 527 requirements. And do we or don't we need to waive that in our valuation of what your net burden is?

MR. SIMPSON: No, Your Honor, you shouldn't waive that, and the reason is this, the *MCFL* decision, the Supreme Court faced a similar type of argument. The FEC said that the Supreme Court has upheld particular types of tax status with the intended burdens on groups like MCFL, Massachusetts Citizens for Life. That was a case called *Regan v. Taxation Without Representation* the FEC relied on. The Supreme Court in a footnote in that decision said in essence the fact that the IRS can make a group become a particular type of entity under tax rules and make it comply with the burdens there does not translate over into federal election rules. That is –

JUDGE GARLAND: Is that the footnote to *MCFL* you [29] said?

MR. SIMPSON: Yes. And just to complete the point, what the Supreme Court said was that's a function of tax status, and it has to do with non-profit status, tax exempt (status, things like that. The fact that the government, the fact that one does not have a right to favorable tax status does not mean that the FEC is entitled to regulate the group because of the type of speech that it wants to engage in. That was the distinction that the Court drew in I think addressing a very similar point to the point the Court is making, or the questions that the Court is asking now.

Your Honors, if I may, I'd like to reserve the balance of my time –

JUDGE SENTELLE: All right.

MR. SIMPSON: – for rebuttal.

JUDGE SENTELLE: You got it.

MR. SIMPSON: Thank you.

JUDGE SENTELLE: We'll hear from the Commission.

ORAL ARGUMENT OF DAVID KOLKER, ESQ.
ON BEHALF OF THE APPELLEE

MR. KOLKER: May it please the Court, I'm David Kolker for the Federal Election Commission.

The Plaintiff's challenge to the contribution limits applicable to political committees must fail because it repeatedly conflates the distinction between contribution [30] limits and expenditure limits, and because the Supreme Court has never struck down a contribution limit by tracing how the funds received are eventually spent. This case does not involve any spending limits. There is no limit on a political committee's ability to spend as much as it likes on independent expenditures –

JUDGE SENTELLE: How does *Citizens United* change your analysis? We've all read your brief that was filed before *Citizens United,* how does it change your analysis?

MR. KOLKER: It really doesn't, Your Honor. *Citizens* –

JUDGE SENTELLE: It doesn't?

MR. KOLKER: No, because *Citizens United* was about a ban on speech, and we have no such thing here. What we have is a limit on contributions. The Supreme Court has repeatedly subjected contribution limits to –

JUDGE GINSBURG: What's the justification for the limits on contributions, then?

MR. KOLKER: Justification?

JUDGE SENTELLE: Yes.

JUDGE GINSBURG: Yes.

MR. KOLKER: Well, in this case you mean?

JUDGE GINSBURG: Yes. Yes.

MR. KOLKER: Well –

JUDGE SENTELLE: This is what we're asking you about [31] right now. Yes, Counsel.

MR. KOLKER: There are many justifications. It mostly has to do with the way that the Supreme Court has looked at contribution limits, and if the contribution limits in this case help evade evasion of the acts directly (indiscernible).

JUDGE KAVANAUGH: But the Supreme Court in *Citizens United* was very careful to phrase it as contributions to candidates, or direct contributions to candidates throughout the opinion. It wasn't talking when it characterized *Buckley* it talked about

contributions to candidates, it wasn't some kind of free-floating contributions to other groups that it was talking about there.

MR. KOLKER: That's true, Your Honor.

JUDGE KAVANAUGH: And I guess the larger question is if an unlimited independent expenditure is not corrupting how can a group of people getting together to make an independent expenditure suddenly become corrupt?

MR. KOLKER: Well, in *Citizens United* the Court explicitly said that it was not dealing with what it has said before about contribution limits. And the Court specifically, at page 43 the Court specifically said *Citizens United* has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous –

JUDGE KAVANAUGH: Right.

[32] MR. KOLKER: – (indiscernible).

JUDGE KAVANAUGH: And my point was they were very careful, you could trace it, you know, page 3, 10, 26, 29, 40, contributions to candidates.

MR. KOLKER: That's right, Your Honor, but nothing *Citizens United* addresses, or undermines the Court's other holdings in numerous other cases about contribution limits being valid if they help prevent certain mention of those direct contribution limits –

JUDGE KAVANAUGH: Right.

MR. KOLKER: – to candidates. And so, starting in *Buckley* the Court had a broad definition of contributions. When the Court upheld the $25,000 annual limit on contributions it defined that term broadly to include money given to organizations that are earmarked for political purposes, and clearly that includes contributions that end up being spent on independent expenditures. When the Court in the first of the two *Colorado Republican* cases ruled what it was looking at first and foremost, or initially was whether political parties could make unlimited independent expenditures, and the Court said that political parties weren't that different from other political committees and in fact had the right to do that.

But in the course of that discussion the Court looked at the potential for corruption that might come about [33] if, once parties were able to do that, and in the course of that discussion the Court talked about independent expenditures being spending that could be used to evade the direct contribution limits. And this is what the Court said, it said the greatest danger of corruption therefore appears to be from the ability of donors to give sums up to $20,000 to a party which may be used for independent party expenditures for the benefit of a particular candidate. We could understand how Congress were to conclude that the potential for evasion of the individual contribution limits was a serious matter might decide to change the statute of limitations on contributions to political parties.

So, the Court was explicitly talking about how independent expenditures could be used to evade those direct contribution limits, and that in fact if Congress thought that there was a problem now that parties could make unlimited independent expenditures, the way to deal with that is not to try to limit those independent expenditures, but instead to limit perhaps further the contributions that political parties could take in that would then in turn be used to make independent expenditures that could benefit candidates. And nothing in *Citizens United* undermines any of that, it was simply silent about that.

JUDGE KAVANAUGH: But just on the logic of your theory if one person spends $1 million to take out an ad [34] that's constitutionally protected.

MR. KOLKER: Yes.

JUDGE KAVANAUGH: But if five people get together and contribute $6,000 each to a nonprofit to support an ad that is corrupting?

MR. KOLKER: Your Honor, once people –

JUDGE KAVANAUGH: And I guess what sense does that make?

MR. KOLKER: This is why it makes sense, Your Honor, because under the Supreme Court's holdings there is a constitutional difference –

JUDGE SENTELLE: Assume there is no Supreme Court holding. Assume you're taking this as

the case first impression, what is the justification for the distinction that Judge Kavanaugh just asked you?

MR. KOLKER: The justification, I mean, it's in line with the Supreme Court holding, Your Honor, that there's a fundamental difference when people are speaking in their own names versus when they set up a separate legal entity. And once they set up a separate legal entity, as they have done here, and they simply give money to that entity –

JUDGE SENTELLE: What is the –

MR. KOLKER: – (indiscernible).

JUDGE SENTELLE: What's the interest that stirs by making that distinction? Obviously, there was a distinction, [35] they're not the same thing, they're not precisely the same thing. You can find a difference, but what difference does that difference make? What is the justification for –

MR. KOLKER: The justification –

JUDGE SENTELLE: – the disapprovement of the millionaire paying a measly million here, and five people paying $6,000 apiece over there, why do you get the burden of the second but not the first?

MR. KOLKER: It goes back to what I was saying about what the Court said in the first *Colorado* case, that independent expenditures can be used to evade those direct limits on contributions to candidates. And that there's a very different burden –

JUDGE KAVANAUGH: That would be true of an individual's independent expenditures, as well.

MR. KOLKER: Yes, but the issue here is not limiting individually.

JUDGE KAVANAUGH: See, and that's where the theory, that's the hurdle I have with your theory, as you may –

MR. KOLKER: Well, remember, there's no limit on an individual's expenditures, obviously, there's no limit on what Speechnow can spend. This is not a situation where five people are writing checks made out to a network to run the ad in their own names. What we're talking about is people coming together, creating a separate organization, the money will be [36] spent in that organization's name, and in fact, we have the quintessential translation of money donated, but then being used by somebody else to decide how that money will be spent that the Court talked about going back to *Buckley*. In this particular case the donors to Speechnow are going to be passive. They're not going to decide which candidates are opposed or supported, they're not going to decide what the advertisements say, those decisions are going to be made by Mr. Keating.

And that is the quintessential thing that the Court talked about, about transforming a contribution into speech that's going to be made by something else. And the difference is, was also alluded to in the Supreme Court's decision in *California Medical Association*. In footnote 17 where the Court distinguished

the situation where you have a group of people coming together to simply spend money jointly. So, this is not the case where Mr. Young and the other donors to Speechnow are going to write checks directly to the media outlet and decide for themselves what the ads are going to say, and have their names on the disclaimers. That's not the case, that's a different case. The Supreme Court set that aside in *California Medical Association,* and said we don't have to address that here because the pact in *California Medical Association* was set up as a separate legal entity, and that's the same thing that we have here.

[37] JUDGE GINSBURG: Is there anything in here that's suggestive of a danger of corruption, or the appearance of corruption?

MR. KOLKER: Yes, Your Honor, but I would like to start by answering that question by –

JUDGE GINSBURG: Yes, there is?

MR. KOLKER: – pointing out –

JUDGE GINSBURG: There is?

MR. KOLKER: Yes.

JUDGE GINSBURG: What is it?

MR. KOLKER: Well, if I – I have sort of two answers to it, and if I could start by pointing out a very important background principle, which is that unlimited contributions to political committees have been illegal for many, many years, so we wouldn't

expect to have a lot of direct evidence about what that would lead to. And in fact, we have –

JUDGE SENTELLE: Are you leading to an answer to the question?

MR. KOLKER: I am going to answer the question –

JUDGE SENTELLE: All right.

MR. KOLKER: – Your Honor.

JUDGE SENTELLE: Please.

MR. KOLKER: I promise. But I do want to point this out that in terms of the burden that we have to come up with [38] evidence, this is like the situation we were in in the second of the *Colorado Republican* cases, because at that point the Court was dealing with –

JUDGE SENTELLE: You don't sound like you're getting much closer to the answer, Counsel.

MR. KOLKER: I promise I'll get there, Your Honor.

JUDGE SENTELLE: Well, then promise you'll get there in about the next minute, please.

MR. KOLKER: Okay. The point from *Colorado Republican* is that there were limits on parties' coordinated expenditures in the years leading up to that decision, and the Court said, "Since there is no recent experience with unlimited coordinated

spending the question is whether experience under the present law confirms a serious threat of abuse from the unlimited coordinated parties' spending." So, we've got in background we do have evidence in the record about the potential for these kinds of large contributions to be turned into independent expenditures. We have the example from the *Keating Five* from years ago where money was given to an independent expenditure group that was going to help Senator Cranston; we have the example of Congressman Snowbarger being offered independent expenditures to be made if he would vote a particular way on legislation about a casino; we had an example from the State of Wisconsin where a legislator was asking people to give money to independent [39] groups in exchange for legislative favors.

JUDGE KAVANAUGH: And that would all still be true of an individual's independent expenditure, as well.

MR. KOLKER: Yes, but again, Your Honor –

JUDGE KAVANAUGH: And that's the problem your theory would justify ultimately limiting an individual's independent expenditures, and the Supreme Court has repeatedly said, including last week, that that's –

MR. KOLKER: I understand, Your Honor, but we're not here defending a limit on individuals' expenditures, we're only here defending a contribution limit.

JUDGE SENTELLE: Don't you have to be able to make a distinction in the potentials for corruption in order to justify the distinction between individual contributions and –

MR. KOLKER: No, Your Honor.

JUDGE SENTELLE: – corruption?

MR. KOLKER: I think it's clear even from *Citizens United* that because of the different standards of review for the fundamental distinction between contribution limits and expenditure limits that what may be insufficient to justify an expenditure limit may be sufficient to justify a contribution limit. I mean, in the *Citizens United* case they talk about the fact pattern that arose in the *Capritson* (phonetic sp.) case. And although the Court clearly didn't find it [40] sufficient to justify the independent expenditure limit, the Court did find it sufficient in that to require recusal of the judge.

And in fact, the other important point that was raised in *Citizens United* is that the Court specifically distinguished this situation that was at issue in *McConnell* where the Court on page 45 of the slip opinion in *Citizens United* said, you know, in BCRA we were dealing with facts where access had been sold through soft money contributions to parties, but we're not dealing with soft money here, we're dealing with an expenditure limit. So, the Court distinguished what it had done in *McConnell,* and I think *McConnell* is dispositive in this case because of the facts at issue there and the reasoning of the Court.

When the Court upheld Title One of BCRA it was dealing with limits on what parties could take in in contributions, that is the soft money contributions that were above and beyond the hard money limits. And in the course of analyzing whether those limits were constitutional it's critical to recognize that what the Court was dealing with was money coming into the political parties that could not be spent on contributions to candidates. It could not even have been spent on express advocacy. At issue in Title One of BCRA was soft money that had been spent on things like get out the vote drives, or even candidate focused issue advocacy. But [41] the ban on soft money in Title One of BCRA had nothing to do with money that the parties were taking in that would then be passed on the form of direct contributions to candidates, and therefore it's very much like the situation we have here.

So, the Court could not have upheld Title One of BCRA simply on a narrow, anti-circumvention, anti-pass through rationale. In other words, it would not have been enough to justify Title One of BCRA if all that Congress could do was have contributions limits to the extent that the money taken in by a political committee could then be used to make direct contributions to candidates. And the Court looked at the soft money contributions and what it was being spent on and recognized that the kinds of things that the parties were spending those soft money contributions were of benefit to candidates, and raised the potential for corruption.

JUDGE KAVANAUGH: Well, there were two differences, though, right? Because in *McConnell* the Court emphasized that political parties had a unity of interest with candidates and office holders, which is not true of outside groups having the same unity of interest. And secondly, there was the record of abuse, namely that parties had specifically sold access to candidates and office holders in exchange for the donations. And again, there's no record evidence here, and I take your point that would be hard to have such record evidence.

MR. KOLKER: Well, Your Honor, it is certainly true [42] that Title One of BCRA only applied to political parties, but there are a few important reasons why a political committee like Speechnow can be treated like a political party. First of all, in terms of the doctrinal analysis of the Court itself, in footnote 48 of *McConnell* where the Court elaborated upon the reasons why Congress could have the limits on soft money, it really equated political committees like Speechnow with the political parties, when it elaborated upon the meaning of the *California Medical Association* case. It talked about that case and explained to us that the decision in that case also could not have been what it was if the only justification for contribution limits was to prevent the recipient of the money from taking that money and going on and making direct contributions to candidates. And that analysis was critical to its reasoning in Title One, and it told us more about what *California Medical Association* means, and in the course

of that discussion treated political committees like the political parties.

In addition, in other parts of *McConnell* the Court upheld restrictions on solicitations to tax exempt groups like Speechnow. There are restrictions in BCRA on what political parties can do, and what federal candidates can do to raise money for tax exempt groups like Speechnow, and the Court upheld those because the Court recognized that they could be used to circumvent the Act, that they could be used to act [43] like parties. And the record before you has a great deal of facts, and Judge Robertson, in his opinion on the preliminary injunction, went on at great length explaining how these parties have become, in the wake of BCRA, unused, as some people have called them shadow parties, taken money, and while they were formally independent from the political parties they are very professionalized, they have taken in tens of millions of dollars, they have very sophisticated ways of testing their ads like the political parties, and the political parties have, or people associated with the political parties who are very high ranking have quietly blessed what they are doing. So, they can have very close ties to the parties and to the candidates.

Moreover, in the two *Colorado Republican* decisions the Court analyzed to the extent the political parties were and were not different from other political committees, and both of them support our position, because in the first *Colorado* case what you had was the political parties arguing that we should

be able to make unlimited independent expenditures. Previously it had been decided in the *National Conservative Political Action Committee* case by the Court that political committees had the right to make unlimited independent expenditures. And the parties came in and said, argued in the first *Colorado* case and prevailed, that they too should be allowed to be able to do that, and the Constitution [44] can't prevent it, and the Court agreed. And part of that analysis was saying that yes, while parties have close ties to their candidates they're not so joined at the hip with them that they don't have the right to make independent expenditures, so they were treated the same way as political committees.

And then in the second *Colorado Republican* case you kind of have the same sense of similarity between political parties and political committees, but this time leading to justifying the limits on coordinated expenditures the political parties are subject to. And what the Court essentially said was that, you know, in some ways political parties are better and worse in terms of corruption, but yes, they are very closely associated with their candidates, and in fact that perhaps gives them a heightened First Amendment right to associate with those candidates.

And on the other hand the Court essentially said well, there's kind of a dark side to that because the parties also become for that very reason very efficient mechanisms for outside donors to use them to gain undue influence and access over the candidates. But the bottom line was, the Court found that for

purposes of coordinated spending the political parties aren't that different from other political committees, and can constitutionally be subject to limits on their coordinated spending.

[45] JUDGE ROGERS: I think –

JUDGE GINSBURG: That's very interesting, but I'm not sure why you're telling us this. Are you assimilating Speechnow to political parties?

MR. KOLKER: Well, the reason I think this is important, Your Honor, is because the other side, or questions have been raised about whether the reasoning for *McConnell* and upholding Title One applies to groups like Speechnow, and I think it's –

JUDGE GINSBURG: Well, it applies to the extent that it's not made inapplicable by *Citizens United.*

MR. KOLKER: I'm sorry, I didn't hear you.

JUDGE GINSBURG: To the extent that it's not made inapplicable by the intervening decision in *Citizens United.*

MR. KOLKER: Well, I don't think *Citizens United* says anything about how similar political parties are.

JUDGE GINSBURG: No, but it does say this, it says we now conclude that independent expenditures, including those made by corporations, not

exclusively, but including those made by corporations, do not give rise to corruption or the appearance of corruption.

MR. KOLKER: I understand, Your Honor.

JUDGE GINSBURG: And you seem to be telling us well, if you think about political parties maybe you'll just think that the Supreme Court got it wrong.

[46] MR. KOLKER: Well, what I'm saying, Your Honor, is that on page 45 of *Citizens United* the Court said the BCRA record establishes that certain donations to political parties called soft money were made to gain access to elected officials. This case, however, is about independent expenditures, not soft money.

JUDGE SENTELLE: But given what Judge Ginsburg points to, and it's on page 42 of the opinion, what is the Government's interest now in this kind of regulation over this kind of entity?

MR. KOLKER: Again, Your Honor –

JUDGE SENTELLE: If there is no corruption or no appearance of corruption the Supreme Court says it doesn't give rise to such, what is the justification for the regulation of the group now?

MR. KOLKER: The justification remains what the Court said in the first *Colorado Republican* case, that independent expenditures can be used as a

means of circumventing the Act's limits on direct (indiscernible) candidates.

JUDGE SENTELLE: What do you do when the language in *Citizens United* seems to be contrary to that, though? I'm not hearing you address *Citizens United.*

MR. KOLKER: Well, Your Honor, I obviously have to concede that in terms of justifying a direct ban on speech the [47] Court has said there's insufficient evidence of independent expenditures being corrupting to allow that. But the decision is silent on the required justification for contribution limits.

JUDGE GRIFFITH: Is circumvention an independent rationale, or isn't it linked to the corruption? Obviously, you need to avoid, you're trying to avoid the language of *Citizens United,* which says that corruption is much different than what you had argued in your brief. It's a new world. Corruption means a lot less than what we thought that it did before. You seem to be trying to avoid the force of that by saying circumvention is an independent rationale for justifying regulation. But is –

MR. KOLKER: Yes.

JUDGE GRIFFITH: – the circumvention not directly related to corruption?

MR. KOLKER: The Court has repeatedly upheld anti-circumvention provisions –

JUDGE GRIFFITH: Why? Because it's related to breeding up corruption?

MR. KOLKER: Because without those, the Court has upheld anti-circumvention provisions without saying that they themselves directly prevent corruption. The Court has said, I believe on the panel, that all members of the Court view that circumvention is a rationale to uphold certain provisions.

[48] So, yes, we are not under the burden of showing that every anti-circumvention provision in and of itself directly prevents corruption.

JUDGE GRIFFITH: What's the point of the anti-circumvention provisions then?

MR. KOLKER: The same way – in other words, that if you –

JUDGE GRIFFITH: If it's not linked to corruption then what?

MR. KOLKER: Well, it's linked to corruption, it's just not a direct prevention of corruption.

JUDGE GINSBURG: Right. So, it prevents circumventing a rule that in turn is meant to prevent corruption?

JUDGE SENTELLE: Yes.

MR. KOLKER: Yes.

JUDGE SENTELLE: So, if there's no corruption under the *Citizens United* decision, then what

justification is there for using circumvention as a weight to regulate? If you're not circumventing to do something – circumventing is to defer to some other interest.

MR. KOLKER: The limits on the contributions at issue here still help prevent circumvention of the direct contribution limits to candidates.

JUDGE SENTELLE: In order to accomplish what goal?

[46] JUDGE GINSBURG: How – go ahead.

MR. KOLKER: Well, again, I go back to the reasoning of *Colorado Republican I* where the Court said that independent expenditures can be the benefit to candidates, they can be used to evade the restrictions –

JUDGE SENTELLE: Now, that was before –

JUDGE ROGERS: But the problem –

JUDGE SENTELLE: – the Supreme Court spoke in *Citizens United,* correct?

MR. KOLKER: Yes. But again, the burden of proof was very different. In *Citizens United* the Court was dealing with strict scrutiny and a ban on the speech.

JUDGE SENTELLE: Suppose it's just intermediate scrutiny.

MR. KOLKER: Pardon?

JUDGE SENTELLE: Suppose it's just intermediate scrutiny, still what is the Government's interest in the regulation?

MR. KOLKER: The Government's interest is in preventing circumvention of the Act's direction contribution laws.

JUDGE SENTELLE: Because?

MR. KOLKER: Because independent expenditures can be used to benefit candidates, and therefore although Congress cannot limit those independent expenditures –

[50] JUDGE SENTELLE: We now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.

MR. KOLKER: But, Your Honor, again on page 45 the Court also says distinguishes BCRA, distinguishes the soft money contribution ban.

JUDGE GINSBURG: And on 45 –

MR. KOLKER: And this is –

JUDGE GINSBURG: – it says in fact, there's only scant evidence that independent expenditures even ingratiate, let alone corrupt.

MR. KOLKER: I understand, Your Honor. Obviously, it's very important to us that the Court explicitly distinguished BCRA, and Title One, and what the Court did in *McConnell* upholding that, and

said that was about soft money contributions, that was about money being used not directly by the parties to give to candidates, but to do other things that will benefit candidates. And there's nothing in *Citizens United* that undercuts what the Court did in Title One of, regarding Title One of BCRA. And in fact, there's explicit language on page 45 saying that this decision is distinguishable.

JUDGE KAVANAUGH: Your theory going back to one of Judge Ginsburg's earlier questions is that yes, Speechnow and other outside groups are the same as political parties.

[51] MR. KOLKER: I wouldn't say they're the same. I would say that in terms of the constitutional restrictions on them they can be treated equivalently, yes.

JUDGE GINSBURG: Because like political parties they can be a vehicle for circumventing something?

MR. KOLKER: Yes. And because they, too, can be, like political parties, have close relationships to the candidates in the parties.

The other case that I would like to –

JUDGE GINSBURG: Is that true as applied to this organization?

MR. KOLKER: I'm sorry, Your Honor?

JUDGE GINSBURG: Is what you just said about ties applicable to this organization, making this (indiscernible) challenge?

MR. KOLKER: Yes, Your Honor. They've obviously, you know, they haven't really done anything yet, so it's a little hard to know what they're going to do.

JUDGE SENTELLE: Yes.

MR. KOLKER: But the important point is that they can't muzzle their donors, and their donor's lobbyists. So, if people want to give $1 million to Speechnow, and Speechnow then goes and spends it to help a candidate, there's nothing to prevent the donor, or the donor's agents or lobbyists from going to the candidates that were helped and pointing out to [52] them what happened because of their donation to Speechnow.

JUDGE GINSBURG: Indeed, your disclosure requirements enable them to document it.

MR. KOLKER: Pardon?

JUDGE GINSBURG: Your disclosure requirements enable them to document that they made –

MR. KOLKER: That's true, Your Honor.

JUDGE GINSBURG: – the contributions, right?

MR. KOLKER: That's true, Your Honor.

JUDGE GINSBURG: But they can't earmark the contributions.

MR. KOLKER: No. Well, they can't earmark them, but of course, they're not – Speechnow isn't claiming to make contributions, just independent expenditures.

JUDGE GINSBURG: That's what I'm saying, they can't earmark their donation for the independent expenditure favoring a particular candidate.

MR. KOLKER: I think they could. I don't think, I mean –

JUDGE GINSBURG: But I thought the rules of Speechnow prohibit that?

MR. KOLKER: Well, you're right, Your Honor. And I think the fundamental point is that Mr. Keating is going to make the decision, so it appears that there's not going to be that kind of earmark. But that doesn't really matter, if Mr. [53] Keating decides to spend $1 million that came from the donor to help somebody, the donor can still go – I mean, right now, for example, Mr. Young is going to provide most of the money, and I don't mean to impute his motives, but since he's going to put in most of the money, if Speechnow went and spent $140,000 tomorrow on an ad it would really be mostly Mr. Young's money, and there would be nothing to stop him from telling whoever was helped that it originated from him.

JUDGE SENTELLE: How dare you speak.

MR. KOLKER: Pardon?

JUDGE SENTELLE: How dare you speak. You don't seem to value your First Amendment values very highly, Counsel.

MR. KOLKER: I'm defending the Acts, Your Honor.

JUDGE SENTELLE: Okay.

MR. KOLKER: I would also like to just point out that there have been Supreme Court cases, and cases from this Court that clearly allowed and contemplate regulation of groups that make independent expenditures as political committees. When the Supreme Court in *Buckley* developed the major purpose test it did so in the very context of independent expenditures, that it was concerned that without the narrowing construction of a political committee the groups that engage purely in issue discussion would be reached, and it therefore established the major purpose test clearly having in mind the fact that you could have a group that made only [54] independent expenditures be subject to the political committee requirements. And in fact, this Court in the en banc *Akins* decision, which admittedly was vacated on other grounds, by a vote of nine to two found that in fact the major purpose test should only be applied to groups that only make independent expenditures. So, it was clearly contemplated by that decision that the requirements for political committee status could apply to groups that make independent expenditures only.

And of course, in the *Massachusetts Citizens for Life* decision from the Supreme Court the Court looked at that corporation and said that it was entitled because it was an ideological corporation, it took business money that it could make independent expenditures from its corporate treasury.

But when it gave the as applied remedy to that organization it limited it, and it said that should MCFL's independent spending become its major purpose then it would have to live by the rules and obligations for political committees. So, again, in that instance you had the Supreme Court clearly contemplating that groups who make only independent expenditures could be constitutionally regulated as a political committee.

JUDGE GINSBURG: Mr. Kolker, what is the Government's interest in insisting on it having disclosure when Speechnow has received $1,000 in contributions, as opposed to such time as it expends the money?

[55] MR. KOLKER: Well, Your Honor, the interest is that Speechnow is a self-professed organization whose major purpose is to advocate for or against the election of candidates. So, in terms of the informational interest for the public, knowing who has money out there that's going to be participating in elections, that is useful to the public to know that a group like this has been established.

JUDGE GINSBURG: Well, it's useful in helping them attract contributions, perhaps, but that's not the Government's interest.

MR. KOLKER: Well, the Government's interest for that kind of disclosure is to provide the public with information.

JUDGE GINSBURG: All right. So, suppose Speechnow says we're going to solicit money, receive donations for the purpose of their organizational purpose of helping candidates who are friendly to First Amendment speech, and we're going to do so with respect to the quadrennial gubernatorial election if any of the final candidates turn out not to be adequately supported. So, for the first three years of that cycle we're just going to accept donations. The fourth year we may or may not make expenditures. But is the public interest in having disclosure all along about who's contributing and so on for those first three years?

MR. KOLKER: Yes. Let me just make sure, you said [56] gubernatorial, so –

JUDGE GINSBURG: Yes. Okay.

MR. KOLKER: So you're saying –

JUDGE GINSBURG: Make it presidential.

MR. KOLKER: Okay.

JUDGE GINSBURG: Yes.

MR. KOLKER: Yes, I think the public has an interest in knowing that there are groups out there who are amassing funds that may become active.

JUDGE GINSBURG: What is that interest? Rather than idle curiosity occurring.

MR. KOLKER: Well, I guess it's no different from learning that all political players, if people understand that a group like Speechnow with its particular political philosophy is raising funds that may cause them to keep an eye on the group, it may cause them to decide that they want to raise money to counter the message. I can't speak for how relevant an individual might find it, but there's certainly an interest –

JUDGE GARLAND: Preemptive politics.

MR. KOLKER: – in terms of knowing the money that's being collected that may be spent on electoral politics.

JUDGE GARLAND: You're looking for preemptive strikes in politics, right.

MR. KOLKER: Your Honor, my time is up. So –

[57] JUDGE SENTELLE: Unless my colleagues have further questions –

MR. KOLKER: Thank you.

JUDGE SENTELLE: – your time is up. Thank you, Counsel. And you have three minutes.

ORAL ARGUMENT OF
STEVEN M. SIMPSON, ESQ.

ON BEHALF OF THE APPELLANTS

MR. SIMPSON: Thank you, Your Honor. One quick point on disclosure that I did not make before, Your Honor, is that all of the Court's hypotheticals and questions that the Court asked me about disclosure would apply equally to an MCFL group. And the Court held in *MCFL* that 434(c) was perfectly adequate to satisfy the Government's interest in MCFL. All of the, you know, the exact same questions could be asked about an MCFL group, whether it's more burdensome to disclose as a pact, et cetera. The Court addressed by those in –

JUDGE KAVANAUGH: Didn't the Court in *MCFL* then go on to say but it might be different if the major purpose of the group was nomination or election of a candidate?

MR. SIMPSON: It did do that, Your Honor, but in light of *Citizens United* a major purpose cannot now become in effect a substitute for applying strict scrutiny to precisely the sort of things that the Supreme Court just held are burdensome in *Citizens United*. Indeed, Mr. Kolker mentioned the *Akins* case, Your Honor, one of the points that this Court [58] made in *Akins* was the bizarre result that the larger the group would be under the major purpose test the

more money it could spend, and therefore the smaller the group is the less money it could spend.

Now, the Supreme Court said, one of the other points that we haven't mentioned yet in *Citizens United* is that it's improper for the government or courts to make distinctions among speakers based on their wealth. The major purpose test if applied to Speechnow, or indeed corporations, if I'm understanding Mr. Kolker correctly *Citizens United* would allow even major purpose corporations to become political committees, notwithstanding everything else he said. But in any event, if that were applied to Speechnow that means the smaller the group is, and the less money it spends the more it can be burdened under the campaign finance list. That just doesn't make any sense under *Citizens United*.

Now, Mr. Kolker called *Citizens United* an expenditure limits case. Your Honors, I think, pointed to the relevant language in *Citizens United*. I think the appropriate thing to call *Citizens United* is a burden case, that case was fundamentally about, not just a direct ban on corporate expenditures, but the alternative to that ban, which is spending money through a pact. The Court made clear that those restrictions are burdensome as a matter of law, and that burdensome laws trigger strict scrutiny.

[59] This Court can decide this case in the simple, under the simple application of strict scrutiny. The laws have to be equivalent if – I mean, in effect

that's what the Supreme Court just held. Upon strict scrutiny, as Your Honors –

JUDGE SENTELLE: Can you win under intermediate scrutiny?

MR. SIMPSON: Your Honor, I don't think – yes, we can, absolutely, and for all the reasons that you made (indiscernible).

JUDGE GINSBURG: How about a rational relationship?

MR. SIMPSON: Your Honor, I think even under a rational relationship in any event –

JUDGE GINSBURG: Very well.

MR. SIMPSON: – intermediate scrutiny is stronger than the rational basis test. All roads lead back to corruption. I think that's one of the take-aways from *Citizens United*. The FEC simply cannot demonstrate corruption under any fair reading of *Citizens United.*

JUDGE GINSBURG: On the last point that Mr. Kolker and I discussed with regard to the timing of when one becomes subject to these regulations, you devoted the last page or two of your brief for that, and he makes an interesting point that alerting the public to the accumulation of your file puts potential opposition speakers on notice, and may produce more speech as a result. Do you have an answer to that?

[60] MR. SIMPSON: Your Honor, I think exactly the same thing could be said about corporations. I mean, corporations do – and *Citizens United* is a good example. In fact, Your Honor, *Citizens United* was actually under a lesser burden than my clients were. *Citizens United* was able to create its film, raise all its money, and actually create the film. It was only prevented ultimately from disseminating or distributing that. Now, my clients under the FEC's argument, can't even raise the money to create their ads before being burdened by what the Supreme Court has just said *Citizens United* could not be burdened.

I think – so, implicitly, the Supreme Court has sort of answered that question, that one could say precisely the same thing about *Citizens United,* nobody knew until Citizens United wanted to distribute its film who was contributing money to that, and yet, the Supreme Court recognized that the mere fact that in effect groups like Speechnow would have to ask the FEC for permission violates the First Amendment.

JUDGE GINSBURG: But they upheld the disclosure requirement.

JUDGE SENTELLE: Yes.

MR. SIMPSON: Ultimately, when they make their expenditures, Your Honor. We're not fighting disclosure as such.

[61] JUDGE GINSBURG: Okay.

JUDGE SENTELLE: Thank you. Okay?

JUDGE GINSBURG: Yes.

JUDGE SENTELLE: Unless someone else has questions the case –

MR. SIMPSON: Thank you, Your Honor.

JUDGE SENTELLE: – will be submitted, and give us adjournment.

(Recess.)

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[62] DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Paula Underwood
Paula Underwood

January 28, 2010

Center for Competitive Politics

STEPHEN M. Hoersting
VICE PRESIDENT

Institute for Justice

STEVEN M. SIMPSON
SENIOR ATTORNEY

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COUNSEL

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November 14, 2007

Ms. Thomasenia Duncan
General Counsel
FEDERAL ELECTION COMMISSION
999 E. Street, N.W.
Washington, DC 20463

Dear Ms. Duncan:

Pursuant to 2 U.S.C. § 437f of the Federal Election Campaign Act of 1971, as amended ("Act"), the undersigned counsel submit the following advisory opinion request on behalf of our client, SpeechNow.org.

I. Introduction

SpeechNow.org is an independent speech organization whose purpose is to expressly advocate the election or defeat of candidates to federal office in the 2008, 2010, and future election cycles. SpeechNow.org is an unincorporated association organized under section 527 of the Internal Revenue Code that will only make independent expenditures financed by individuals. SpeechNow.org needs to know whether it is required to register with the Commission as a political committee, and whether certain other provisions of the Federal Election Campaign Act apply to it and to its donors. SpeechNow.org has commitments from several individuals who wish to donate in excess of $5000 to the organization, but to date it has not accepted aggregate funds in excess of $1000 because it is concerned that doing so may trigger the political committee thresholds for "contributions" received and "expenditures" made, as set forth in 2 U.S.C. § 431(4).

SpeechNow.org believes the Act requires Speech Now.org to place disclaimers on its solicitations and independent-expenditure communications, and to report its independent expenditures when and as it makes them, pursuant to 2 U.S.C. § 434(c). But SpeechNow.org requests the Commission's guidance as to whether it is required to register with the Commission as a political committee, whether it is subject to the contribution limits of 2 U.S.C. § 441a(a)(1)(C), and whether donors to SpeechNow.org must count their donations to SpeechNow.org against individual biennial aggregate limits described in 2 U.S.C.

§ 441a(a)(3). SpeechNow.org believes that each of these questions should be answered by the Commission in the negative, for the reasons that follow.

II. Factual Statement

SpeechNow.org is an independent group of individuals dedicated to promoting and protecting Americans' First Amendment rights to free speech, association, and assembly. *See* Bylaws of SpeechNow.org ("Bylaws"), Article II, Mission, attached as Exhibit A. Its mission and major purpose is to advocate the election of candidates – in the 2008, 2010, and future federal election cycles – who favor returning America to a state of political freedom and advocating the defeat of candidates who favor speech restrictions in the name of campaign finance reform. *Id.* This includes advocating the election of candidates who favor repealing the electioneering communication provision of the so-called "McCain-Feingold" legislation of 2002. *Id.*; *see also*, 107 Pub. Law. 155 (Mar. 27, 2002).

SpeechNow.org is an unincorporated association under the laws of the District of Columbia, and is registered as a "political organization" under Internal Revenue Code section 527. *See* Articles of Organization, attached as Exhibit B; Statement of Appointment of Registered Agent for Service of Process, attached as Exhibit C; Internal Revenue Form 8871 of SpeechNow.org, attached as Exhibit D; and Notice of Business Tax Registration, attached as Exhibit N.

Because SpeechNow.org is not incorporated and has the sole purpose of electing or defeating candidates to federal office, it believes that it is not an exempt organization under *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), and regulations promulgated by the Commission. *See* 11 CFR 114.10.

SpeechNow.org is comprised of the following Members of its governing board: David Keating, President and Treasurer; Jon Coupal, Vice President and Secretary; Edward H. Crane III, Member; Richard A. Marder, Member; and Daniel J. Shapiro, Member. *See* Member Action by Written Consent in Lieu of an Organizational Meeting of SpeechNow.org (Oct. 24, 2007), attached as Exhibit E.

SpeechNow.org will solicit donors for funds to buy public political advertising and for administrative purposes. These donors will be informed that the public political advertising will advocate the election of candidates to federal office that are respectful of free speech and the defeat of candidates to federal office who favor campaign finance regulation and other speech restrictions. SpeechNow.org will run such advertisements – independent expenditures as defined at 2 U.S.C. §431(17) and 11 C.F.R. 100.16 – in the districts of voters able to elect or defeat those officeholders.

SpeechNow.org will operate wholly independently of candidates, political party committees, and any other political committees. *See* Exhibit A, Bylaws, Article X, Member and Association Rules.

SpeechNow.org will make no contributions (or donations) of any kind to any FEC-regulated political committee. *See* Exhibit A, Bylaws, Article VI, § 10, Certain Expenditures Prohibited. SpeechNow.org will not "coordinate" its activities, as defined in 2 U.S.C. §§ 441a(a)(7)(B) & (C) and 11 CFR Part 109, with any candidates, national, State, district or local political party committees, other political committees, or their agents. *See* Exhibit A, Bylaws, Article X, Member and Association Rules, §§ 2-10.

SpeechNow.org was not established by any political committee or any other organization, nor will it be financed, maintained or controlled by any political committee or any other organization.

SpeechNow.org will not directly or indirectly accept donations or anything of value from business corporations, labor organizations, national banks, federal government contractors, foreign nationals, or political committees. *See* Exhibit A, Bylaws, Article VI, § 9, Certain Contributions Prohibited. Nor will it accept donations or contributions from other political organizations or political committees, but will only accept donations from individuals. *Id.* It will keep records to demonstrate that it has not accepted such donations. *Id.*

SpeechNow.org will not engage in business activities including any provision of goods or services that results in income to SpeechNow.org or advertising or promotional activity that results in income to SpeechNow.org, other than in the form of

membership dues or donations. *See* Exhibit A, Bylaws, Article VI, § 6, Business Activities Prohibited. SpeechNow.org will not offer to any donors or members any benefit that is a disincentive for them to disassociate themselves with SpeechNow.org on the basis of SpeechNow.org's position on a political issue. *See* Bylaws, Article VI, § 8, Benefits of Support for the Association. SpeechNow.org will not offer its donors credit cards, insurance policies or savings plans, nor will it offer training, education, business information, or any other benefits other than that which is necessary to enable recipients to engage in promotion of SpeechNow.org's political ideas. *Id.*

Donors to SpeechNow.org will be advised that their donations are not tax deductible and will be used for political purposes such as supporting or opposing the election of candidates. *See* Exhibit A, Bylaws, Article VI, § 11, Disclosures to Supporters.

SpeechNow.org will run political advertisements over television in the 2008 and 2010 election cycles. It has prepared scripts for two ads to be run in 2008, "Burton" and "Landrieu," *see* Burton Script, attached as Exhibit F; Landrieu Script, attached as Exhibit G, and has retained The Traz Group to produce the ads and reserve airtime, *see* Bid of Mr. Ed Traz on behalf of The Traz Group, attached as Exhibit H. SpeechNow.org would already have produced these ads except that the production costs exceed the $1000 limit for expenditures counting toward political committee status under 2 U.S.C. § 431(4). *See* Bid of Mr.

Ed Traz on behalf of The Traz Group, attached as Exhibit H.

The following individuals are willing and able to donate more than $5000 per calendar year to SpeechNow.org contingent only upon a favorable ruling from the Commission. David L. Keating will donate $5500. *See* declaration of David L. Keating, attached as Exhibit I. Edward H. Crane III will donate $6000. *See* declaration of Edward H. Crane III, attached as Exhibit J. Fred M. Young, Jr. will donate $ 110,000. *See* affidavit of Fred M. Young, Jr., attached as Exhibit K. Richard A. Marder will donate $5500. *See* declaration of Richard A. Marder, attached as Exhibit L. SpeechNow.org would already have accepted these donations, but each donation, if deemed a "contribution" by the Commission, exceeds the $1000 threshold for contributions counting toward political committee status under 2 U.S.C. § 431(4). Each donation would also exceed applicable contribution limits to SpeechNow.org ($5000), *see* 2 U.S.C. § 441 a(a)(1)(C), should the Commission determine that SpeechNow.org must register with the Commission as a political committee, and would place both SpeechNow.org and these donors in legal jeopardy under Federal law.

SpeechNow.org is prepared to make independent expenditures, as defined at 2 U.S.C. § 431(17), paid for with funds raised solely from these and other individuals. It is prepared to place disclaimers on its written solicitations in compliance with 2 U.S.C. § 441d(a), and to place disclaimers on its independent

expenditures in compliance with 2 U.S.C. § 441d(d)(2). SpeechNow.org is prepared to report its independent expenditures according to the provisions for organizations "other than political committees" in 2 U.S.C. § 434(c). Before proceeding, SpeechNow.org must ask the Commission for guidance on several questions.

III. Questions

SpeechNow.org asks the Commission the following questions:

1) Must SpeechNow.org register as a political committee as defined at 2 U.S.C. § 431(4)? Specifically:

   a) Must SpeechNow.org register as a political committee before accepting contributions, as the term is defined in the Act, in excess of $1000, or making expenditures, as that term is defined in the Act and in *Buckley v. Valeo*, 424 U.S. 1 (1976), in excess of $1000, because its major purpose is to influence the election or defeat of candidates for Federal office?

   b) Must SpeechNow.org register as a political committee after it has received donations in excess of $1000 from donors who are informed that the purpose of SpeechNow.org is to influence elections through advocacy for or against the election of clearly identified candidates, but before it has made expenditures in excess of $1000?

c) Must SpeechNow.org register as a political committee after making expenditures in excess of $1000?

2) Are donations to SpeechNow.org "contributions" (as defined at 2 U.S.C. § 431(8)) subject to the limits described at 2 U.S.C. § 441a(a)(1)(C)?

3) Must an individual donor to SpeechNow.org count his donations to SpeechNow.org among the "contributions" applicable to his individual biennial aggregate contribution limit described at 2 U.S.C. § 441a(a)(3)?

IV. Discussion

Overview

The Federal Election Campaign Act of 1971, as amended, operates "in an area of the most fundamental First Amendment activities," *Buckley v. Valeo*, 424 U.S. 1, 14 (1976), and is constitutional only insofar as it furthers three purposes:

1) To prevent the corruption that stems from "large contributions [that may] secure political *quid pro quo's* from current and potential office holders", or the "appearance of [such] corruption." *Buckley, supra*, at 27-28;

2) To prevent the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and . . . have little or no correlation to the public's support for the

corporation's political ideas" *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990); or

3) To "provide the electorate with information . . . to aid the voters in evaluating those who seek federal office"; "deter actual corruption and [its] appearance . . . by exposing large contributions and expenditures to the light of publicity," and "gather[ ] the data necessary to detect violations of the contribution limitations." *Buckley* at 66-68.

Because SpeechNow.org would not make contributions to, nor coordinate its activities or communications with, candidates, political committees, or their agents, SpeechNow.org does not believe that registering as a political committee and subjecting itself to contribution limits would further any interest in preventing *quid pro quo* corruption or its appearance.

Because SpeechNow.org is not incorporated, does not accept anything of value from corporations or labor unions, and is not established, financed, maintained, or controlled by any corporation or labor organization, SpeechNow.org does not believe that registering as a political committee would stem corruption arising from the "corrosive effects of . . . wealth that are accumulated with the help of the corporate form."

The informational interests recognized in *Buckley* are satisfied by SpeechNow.org placing disclaimers on its written solicitations in compliance with 2 U.S.C. § 441d(a), and disclaimers on its independent

expenditures in compliance with 2 U.S.C. § 441d(d)(2); and by SpeechNow.org reporting its independent expenditures in excess of $250 and the names of those individuals who help SpeechNow.org finance independent expenditures through donations in excess of $200. The reporting requirements of 2 U.S.C. § 434(c) are sufficient to further these interests without subjecting SpeechNow.org to the burdens associated with organizing, registering and administering a political committee.

For these reasons, SpeechNow.org asks whether it is required to organize as a political committee under 2 U.S.C. § 432, register with the Commission as a political committee pursuant to 2 U.S.C. § 433, or report as apolitical committee under 2 U.S.C. § 434(a). SpeechNow.org also asks whether the donations it receives from individuals are subject to the contribution limits of 2 U.S.C. § 441a(a)(1)(C), and whether the individuals who donate to SpeechNow.org must count those donations against their individual biennial aggregate contribution limit found at 2 U.S.C. § 441a(a)(3).

1. Must SpeechNow.org register as a political committee as defined at 2 U.S.C. § 431(4)?

A "political committee" means any committee, club, association, or other group of persons which receives *contributions* aggregating in excess of $1000, or makes *expenditures* aggregating in excess of $1000 during a calendar year. 2 U.S.C. § 431(4). But "[t]o

fulfill the purposes of the Act [political committees] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Buckley v. Valeo*, 424 U.S. 1, 79-80 (1976). SpeechNow.org is not under the control of any candidate, but its major purpose is to expressly advocate the election of candidates who respect free speech, and the defeat of candidates who do not.

a) *Must SpeechNow.org register as a political committee before accepting contributions, as the term is defined in the Act, in excess of $1000, or making expenditures, as that term is defined in the Act, in excess of $1000, because its major purpose is to influence the election or defeat of candidates for Federal office?*

If the Commission determines that SpeechNow.org must register as a political committee, when must it register? Must it register as a political committee, before making expenditures or receiving contributions, solely on the basis of its major purpose?

Longstanding precedent suggests that major purpose alone is insufficient to require SpeechNow.org to register as a political committee. The statute itself makes no reference to "major purpose" as triggering political committee status. The Federal District Court for the District of Columbia has held that "[t]he major purpose test treats an organization

as a 'political committee' *if* it receives contributions and/or makes expenditures of $1000 or more *and* its 'major purpose' is the nomination or election of a particular candidate or candidates for federal office. *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D. D.C. 1996) (emphasis added). And "[c]ircuit precedent indicates . . . that even if the organization's major purpose is the election of a federal candidate or candidates, the organization does not become a 'political committee' unless or until it makes expenditures in cash or in kind to support a 'person who has decided to become a candidate' for federal office." *Id.*, *quoting FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 392 (D.C. Cir. 1981) (emphasis added).

Nevertheless, some doubt about this apparently clear provision of the law has been cast by certain commentators,[3] courts,[4] and even the Commission itself.[5] In particular, in *Shays v. FEC*, Civ. No. 04-1597, 2007, U.S. Dist. LEXIS 63688, at *14 (D. D.C.

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[3] *See* Edward B. Foley and Donald Tobin, *The New Loophole: 527s, Political Committees, and McCain-Feingold*, BNA Money & Politics Report, Jan. 7, 2004.

[4] *Shays v. FEC*, Civ. No. 04-1597, 2007, U.S. Dist. LEXIS 63688 (D. D.C. August, 30, 2007) (*Shays II*).

[5] *See e.g.* MURs 5511 & 5525 (Swift Boat Veterans for Truth); MUR 5753 (League of Conservation Voters); MUR 5754 (MoveOn.org Voter Fund); and MUR 5487 (Progress for America Voter Fund). In each of these and other recently released MURs, SpeechNow.org submits that the released documents do not make clear whether the basis for the Commission's determination that the organizations involved should have registered as political committees.

August, 30, 2007) (*Shays II*), the Federal District Court for the District of Columbia stated in *dicta* that that it is error, and a misreading of *Buckley*, *supra*, for the "FEC [to] believe[ ] that there is an 'express advocacy requirement for expenditures on communications made independently of a candidate,' which applies to all organizations regardless of whether they satisfy the 'major purpose' test." *Shays II, supra*, at 12. This *dicta* is directly contrary to the holdings in *GOPAC* and *Machinists*, which imposed an express-advocacy requirement – a requirement that independent organizations engage in speech that expressly advocates the election or defeat of a clearly identified candidate or candidates to federal office – to meet the Act's definition of "expenditure." This is why the *GOPAC* court held that "[a]s a matter of law, the Commission [at that time] failed to demonstrate that GOPAC became a 'political committee' within the meaning of the Act by spending or receiving $1000 or more and engaging in 'partisan politics' and 'electioneering' [rather than engage in express advocacy]." *GOPAC, supra*, at 861-62. As a result, it is not clear to SpeechNow.org what standard the Commission is using in determining when an organization becomes a political committee.

SpeechNow.org believes that a proper interpretation of the law requires an organization to make expenditures or receive contributions in excess of $1000 before it can be required to register as a political committee, regardless of the organization's major purpose. SpeechNow.org seeks clarification

that, having not made $1000 in expenditures or received $1000 in contributions, it is not at this time required to register as a political committee. Therefore, we ask the Commission to conclude that SpeechNow.org, by virtue of its major purpose alone, is not at this time required to register with the Commission as a political committee.

b) Must SpeechNow.org register as a political committee after it has received donations in excess of $1000 from donors who are informed that the purpose of SpeechNow.org is to influence elections through advocacy for or against the election of clearly identified candidates, but before it has made expenditures in excess of $1000?

SpeechNow.org intends to solicit and receive donations aggregating in excess of $1000, and has submitted affidavits and declarations from individuals who intend to contribute such amounts. However, SpeechNow.org may hold and accumulate funds in excess of $1000 for some time, without making expenditures that would trigger political committee status. Thus, SpeechNow.org seeks guidance on whether the receipt of funds solicited for the eventual purpose of advocacy for or against candidates to Federal office triggers political committee status that would require SpeechNow.org to register before making any expenditure relative to a clearly identified candidate.

Under the Act, a "contribution" means a gift, subscription, loan, advance or anything of value made for the purpose of:

> (A) influencing the nomination for election, or election, of any person to Federal office or for the purpose influencing the results of a primary held for the selection of delegates to a national nominating convention of a political party, or
>
> (B) influencing the results of an election held for the expression of a preference for the nomination of persons for election to the office President of the United States.

2 U.S.C. § 431(8).

For many years the Commission determined that only if funds were spent as "expenditures" could they in turn be deemed to be "contributions" under the Act. In its 2004 rulemaking on political committee status, 69 FR 68056 (Nov. 23, 2004), the Commission adopted an additional definition of "contribution" at 11 CFR 100.57. According to the accompanying explanation and justification (E&J), the regulation "classifies all funds provided in response to a communication as contributions under FECA if the communication indicates that any portion of the funds will be used to support or oppose the election of a clearly identified candidate." *Id.* at 68057. The E&J claims as support for this interpretation *FEC v. Survival Education Fund*, 65 F.3d 285 (2d Cir. 1994) ("*SEF*"). The Second Circuit holding in *SEF*, however, applies only to

prevent the corruption (or its appearance) of candidates and officeholders, and did not apply to organizations that operate independently of political party committees and candidates. Therefore, SpeechNow.org asks whether it must register as a political committee after it receives donations in excess of $1000 from donors who are informed that the purpose of SpeechNow.org is to influence elections by advocating either the election or defeat of clearly identified candidates, even though it has not made "expenditures" as defined in the Act.

The Survival Education Fund was an independent, not-for-profit corporation founded in 1978 to educate the public regarding nuclear and alternative sources of energy. *SEF* at 287. At the time of the 1984 Presidential election cycle, Survival Education Fund used its treasury funds to co-sponsor a fund-raising letter to the general public that opposed the reelection of then-President Ronald Reagan. The mailer sought "help", saying it was "urgent" that the public "respond to this message as soon as possible . . . as a favor to [SEF] and for the future of the country." *SEF* at 288.

As party to the case in the early 1990s, the Commission alleged that Survival Education Fund violated 2 U.S.C. § 441d(a), which requires a disclaimer on any public mailing that expressly advocates the election or defeat of a clearly identified candidate or solicits a contribution. The disclaimer, if made, would have disclosed who paid for the mailing and whether it was authorized by, or made

independently of, a candidate or candidate's committee. *Id.* The Second Circuit had to determine whether the mailer solicited a "contribution,"[6] and looked to Buckley in making its determination. In *Buckley*, the Supreme Court identified three types of contributions regulable under FECA: 1) "contributions made directly or indirectly to a candidate, political party, or campaign committee;" 2) "contributions made to other organizations or individuals but earmarked for political purposes;" and 3) "expenditures [coordinated] with a candidate, his agents, or an authorized committee of the candidate." *Buckley*, 424 U.S. at 78. It was the second type of contribution that intrigued the Second Circuit; funds "earmarked for political purposes."

The Second Circuit reasoned that "*Buckley's* definition of independent expenditures . . . provides a limiting principle for the definition of contribution in 431(8)(A)(i), as applied to groups acting independently of any candidate or his agents and which are not political committees under FECA." *Id.* at 295. It

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[6] The Second Circuit did not determine whether the mailer expressly advocated President Ronald Reagan's defeat. Instead, the Second Circuit held that Survival Education Fund had a right to finance the mailer using its treasury funds, whether or not it contained express advocacy, because Survival Education Fund was exempt from FECA's corporate source prohibition by operation of the Supreme Court's opinion in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986). As noted, because SpeechNow.org not a corporation, it does not appear to qualify for the *MCFL* exemption.

then interpreted the phrase "earmarked for political purposes" to include those funds "that will be converted to expenditures subject to regulation under FECA". *SEF* at 295.

The Second Circuit then held that "[e]ven if a communication does not itself constitute express advocacy, it may still fall within the reach of § 441d(a) [FECA's disclaimer provisions] if it contains solicitations clearly indicating that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office." *Id.* The Second Circuit held nothing more than that "[t]he July 24, 1984 mailing was a solicitation of *contributions* within the meaning of §441d(a) as we construe that section." *SEF* at 295 (emphasis added). In short, the Second Circuit determined nothing more than that Survival Education Fund's solicitation must carry a disclaimer.

The E&J's explanation of the new rule is inconsistent with SEF on which it relies. *See Supplemental Explanation and Justification, Political Committee Status*, 72 *FR* 5595 (Feb. 7, 2007). The E&J seems to suggest, contrary to *SEF*, that if funds given in response to a solicitation can be regulated constitutionally as a "contribution" for purposes of the disclaimer provisions of § 441d(a)(3), then those same funds can be regulated constitutionally as a "contribution" for all parts of FECA. This would mean that funds provided in response to a solicitation that indicates that any portion of the funds will be used to support or oppose the election of a clearly identified

candidate are "contributions" not just under the disclaimer provisions of § 441d(a) or the reporting provisions of § 434(c), but also under the contribution limits of § 441 a(a)(1)(C), the individual biennial aggregate limit of § 441a(a)(3), and even the definition of political committee at 2 U.S.C. § 431(4). Further, the E&J suggests this reading whether or not regulation of the funds in each application would advance a constitutional governmental interest in FECA.

The Second Circuit did determine that "[a] communication . . . may still fall within the reach of § 441d(a)(3) if it contains solicitations clearly indicating that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office." *SEF* at 295. But the Second Circuit said that its reasoning applies only to those instances that address a corrupting nexus to candidates and officeholders:

> [Our] interpretation limits the application of §441d(a) to Congress's core purpose: [i]nforming the public whether ostensibly unaffiliated organizations taking positions in an election or beseeching contributions from the public are doing so at the *behest of candidates*."
>
> * * *
>
> Potential contributors are entitled to know that they are supporting independent critics of a candidate and not a group that may be in league with that candidate's opponent."
>
> * * *

> By requiring disclosure of who has paid for the solicitation and that it is not being made on behalf of a candidate, *the statute deters clandestine corruption of candidates*, an interest that the Supreme Court has repeatedly found compelling.

SEF at 295-297 (emphasis added).

Indeed, the Second Circuit was concerned about proceeding in the absence of a nexus to candidates or officeholders, and specified the limits of its holding by noting that "[s]ection 441d(a)(3) . . . does not require direct disclosure of what an individual or group contributes or spends [the very essence, by the way, of political committee reporting] but only disclosure of who paid for the particular communication at issue and that it was *not authorized by a candidate or his agents*." *SEF, supra*, at 297. (Emphasis added).[7]

The Second Circuit's opinion in *SEF* teaches that funds solicited or received are "contributions" for purposes of the Act only where the application of the Act

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[7] Further, because a group may make independent expenditures in unlimited amounts, and because 2 U.S.C. § 434(c) provides a separate reporting mechanism for groups "other than political committees" that make such expenditures, it cannot be that a group soliciting funds necessary to make independent expenditures and operating other than as a political committee is somehow converted into a political committee. The statute clearly anticipates that a group can raise money for expressly advocating the defeat of candidates, through independent expenditures, without becoming a political committee. *See* footnotes 14-15 and accompanying text, *infra*.

to the funds or solicitation of funds would further one of the three compelling governmental interests enunciated in *Buckley, supra*, and discussed above. Each of those interests is either inapplicable to SpeechNow.org or is addressed by other, less burdensome provisions within the Act and therefore they do not, individually or collectively, require SpeechNow.org to register as a political committee.[9]

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[9] First, requiring SpeechNow.org to register as a political committee would further no governmental interest in preventing *quid pro quo* corruption because SpeechNow.org operates wholly independently of candidates and political committees. Second, requiring SpeechNow.org to register as a political committee would further no governmental interest in preventing corruption by aggregations of wealth amassed by benefit of the corporate form because SpeechNow.org is unincorporated, has no ties to corporations or labor organizations, and engages in no business activities. The third interest in requiring an organization to register as a political committee is comprised of three sub-interests. One sub-interest is to "provide the electorate with information . . . to aid the voters in evaluating those who seek federal office." *Buckley*, at 66-68. Another sub-interest is to "deter actual corruption and [its] appearance . . . by exposing large contributions and expenditures to the light of publicity." *Id.* These sub-interests are adequately addressed by the disclaimer and disclosure provisions of U.S.C. §§ 441d(a), 441d(d)(2) and 434(c). The third sub-interest is to "gather[ ] the data necessary to detect violations of the contribution limitations." *Buckley* at 66-68. This last sub-interest in disclosure (and by extension, in political committee registration and reporting) is inapplicable to SpeechNow.org because SpeechNow.org makes no contributions and operates independently of candidates. Moreover, as discussed fully below, donations from individuals to SpeechNow.org cannot be subject to contribution limits without violating the rights of speech and association of the individual donors and SpeechNow.org. Public monitoring of SpeechNow.org's receipts

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Furthermore, the funds received from individuals responding to a solicitation from SpeechNow.org are more similar to a political expenditure than to a political contribution. Such gifts differ from the making of a contribution to a candidate; donations to SpeechNow.org foster speech, a particularized message with which the donor agrees and which he has decided to finance, and is more than just the undifferentiated symbolic act of giving. *Cf. Buckley, supra*, at 21 (contributions to candidates are a kind of speech by proxy; rest solely on the undifferentiated, symbolic act of giving). Paraphrasing the Supreme Court in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 258 (1986), "[t]he resources available to *this* fund . . . in fact reflect popular support for the political positions of the committee." As the Court noted, donors to ideological organizations know precisely why they participate in and finance ideological organizations:

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and disbursements, *see* 2 U.S.C. § 434(a), therefore, will not detect violations of the contribution limits of 2 U.S.C. § 441a(a)(1)(C) or the contribution limits of 2 U.S.C. § 441a(a)(3). In short, no governmental interest is served by requiring SpeechNow.org to register as a political committee. Therefore, FECA's independent-expenditure-reporting provisions for organizations other than political committees (2 U.S.C. § 434(c)), and not its political-committee organization, registration, and reporting provisions (2 U.S.C. §§ 432, 433, and 434(a)), are both the method of disclosure contemplated by FECA and the method that is sufficiently tailored to the compelling interests Congress sought to advance.

> Individuals who contribute to [the ideological organization] are fully aware of its political purposes, and in fact contribute precisely because they support those purposes. It is true that a contributor may not be aware of the exact use to which his or her money ultimately may be put, or the specific candidate that it may be used to support. However, individuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction. Any contribution therefore necessarily involves at least some degree of delegation of authority to use such funds in a manner that best serves the shared political purposes of the organization and contributor.

Id. at 261-62.

In accordance with *SEF*, SpeechNow.org believes that its solicitations of funds for independent expenditures are required by the Act to carry disclaimers in conformity with 2 U.S.C. § 441d(a), which applies both to political committees and organizations other than political committees, so the public may know that SpeechNow.org operates independently of candidates. However, because these funds are not contributions for purposes of 2 U.S.C. § 434(c), Speech Now.org is not required to register as a political committee merely by virtue of accepting donations, even if those donations were made to SpeecbNow.org in response to a written solicitation that indicated the

funds would be used to run independent expenditures, that is, express advocacy to the general public.

c) Must SpeechNow.org register as a political committee after making expenditures in excess of $1000?

SpeechNow.org will also make "expenditures,"[10] specifically, "independent expenditures,"[11] and asks whether it must register as a political committee after making "expenditures" in excess of $1000.

An independent expenditure is a "communication by a person expressly advocating the election or defeat of a clearly identified candidate that is not

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[10] "Expenditure" means a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made for the purpose of:

> (A) influencing the nomination for election, or the election, of any person to Federal office, or to the office of presidential and vice-presidential elector; or influencing the results of a primary election held for the selection of delegates to a national nominating convention of political party or for the expression of a preference for the nomination of persons for election to the office of President of the United States.

[11] Independent expenditures constitute expression "'at the core of our electoral process and of the First Amendment freedoms.'" *Buckley, 424 U.S., at 39* (quoting *Williams v. Rhodes, 393 U.S. 23, 32 (1968)). See also FEC v. National Conservative Political Action Committee, 470 U.S. 480, 493 (1985)* (NCPAC) (independent expenditures "produce speech at the core of the First Amendment").

made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents."[12] 2 U.S.C. § 431(17).

SpeechNow.org concedes that its express advocacy communications and solicitations of funds for independent expenditures should carry disclaimers in conformity with 2 U.S.C. §§ 441d(a) and 441d(d)(2) so the public may know that SpeechNow.org operates independently of candidates.[13] Similarly, SpeechNow.org

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[12] The Commission notes in its latest political committee explanation and justification, *see Supplemental Explanation and Justification, Political Committee Status*, 72 FR 5595 (Feb. 7, 2007) that "[n]either BCRA [nor] *McConnell* has eliminated . . . the Supreme Court's express advocacy requirement for expenditures on communications made independently of a candidate."

[13] The Act requires a disclaimer for any communication that expressly advocates the election or defeat of a candidate, or solicits a contribution:

> [W]henever any person makes a disbursement for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any . . . general public political advertising . . . such communication –
>
> (3) if not authorized by a candidate . . . or its agents, shall clearly state the name and permanent street address, telephone number or . . . Web address of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee.

2 U.S.C. § 441d(a)(3).

concedes that the amounts spent on its independent-expenditure communications, as well as the names of "contributors", *see* 2 U.S.C. §434(c), and the amount of their "contributions" must be reported under 2 U.S.C. § 434(c) to "provide the electorate with information . . . to aid the voters in evaluating those who seek federal office" and to "deter actual corruption and [its] appearance . . . by exposing large . . . expenditures to the light of publicity." *Buckley* at 66-68. But the Act furthers those interests by requiting disclaimers and disclosure for independent organizations without requiring those organizations to register as political committees. *See* 2 U.S.C. §§ 434(c) (reporting of independent expenditures by "persons . . . other than political committees"); 441d(a) (disclaimers on express advocacy communications or solicitations by "any person"), and 441d(d)(2) (disclaimers on communications by "other person[s]").

SpeechNow.org's wish to associate with fellow citizens to make expenditures independently of any candidate or political committee should not, under a proper interpretation of the Act, convert SpeechNow.org into a fully regulated political committee. Organizations have a right to engage in unlimited independent expenditures. *Buckley, supra*, at 51. FECA provides a method for the reporting of independent expenditures by persons "other than political committees", 2 U.S.C. § 434(c).[14] If the Commission were

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[14] "Every person (other than a political committee) who makes independent expenditures in an aggregate amount or

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to require SpeechNow.org to register as a political committee on the basis of its expenditures in excess of $1000, the effect would be to render 2 U.S.C. § 434(c), which provides for reporting by persons "other than political committees" that make independent expenditures in excess of $250, a virtual nullity. Surely Congress did not intend that 2 U.S.C. § 434(c) would only capture and provide reporting requirements for independent expenditure organizations that spend more than $250 but less than $1000 on independent expenditures.[15] In that instance, Congress could not

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value in excess of $250 in a calendar year shall file a statement containing . . . information . . . for all contributions received by such parson." 2 U.S.C. § 434(c)(1).

The term "person" in 2 U.S.C. § 434(c) applies to organizations such as SpeechNow.org no less than to individuals, "The term 'person' includes an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal government." 2 U.S.C. § 431(11).

[15] Similarly, Congress could not have intended that every independent organization that solicits more than $1000 for independent expenditure communications (a necessary predicate to spending $1000) becomes a political committee merely because the solicitation indicates that the funds "will be used to support or oppose the election of a clearly identified candidate." *See* 11 CFR 100.57. *See* discussion supra, part III. 1. b). Note also that other organizations cannot engage in independent expenditures at all – corporations and unions are prohibited from making such communications under 2 U.S.C. § 441b; other unincorporated organizations, operating under Internal Revenue Code § 501(c), are generally limited in such activities by their tax status. To suggest that 2 U.S.C. § 434(c) exists for the benefit of partnerships and Indian Tribes seeking to make independent expenditures strains all credulity.

have intended that political committee status automatically follows, thus thrusting the independent organization into the organizational, registration, and reporting requirements of 2 U.S.C. §§ 432, 433, and 434(a). Such an interpretation would render § 434(c) an absurdity.

Moreover, there are constitutional problems in requiring independent speech organizations to comply with FECA's political committee provisions, and therefore suggest, under a proper statutory reading, that SpeechNow.org's activities do not require it to register as a political committee. As stated by the Supreme Court, "[t]he administrative costs of complying with [the] increased responsibilities [of organizing, registering, and reporting as a political committee] may create a disincentive for the organization itself to speak." *MCFL, supra*, 255, n.7.[16]

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[16] The Court in *MCFL* also stated that:

> Furthermore, should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee. *See Buckley*, 424 U.S. 1 at 79. As such; it would automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns.

MCFL, at 262.

First, the statement is *dicta* as the Court did not decide the question of whether there are constitutional problems in regulating an organization with no ties to candidates, and no ties to corporations or labor organizations, but whose major purpose is independent campaign activity. Second, the *MCFL* opinion is a

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As stated by Justice O'Connor, the *Buckley* Court "was concerned not only with the chilling effect of reporting and disclosure requirements on an organization's contributors, 424 U.S., at 66-68, but also with the potential burden of disclosure requirements on a group's own speech. *Id.*, at 74-82." *MCFL* at 265, J. O'Connor, concurring). Justice O'Connor noted that the requirements of administering a political committee can deter organizations like SpeechNow.org from speaking, and must only be required where registering as a political committee would further some governmental interest.

> In my view, the significant burden on MCFL [if it were required to register with the Commission] in this case comes *not from the disclosure requirements that it must satisfy, but from the additional organizational restraints imposed upon it by the Act*. [E]ngaging in campaign speech requires MCFL to assume a more formalized organizational form . . . . These additional requirements do not further the Government's informational interest in campaign disclosure, and, for the reasons given by the Court, cannot be justified by any of the other interests identified

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corporate-form corruption case of the kind discussed in *Austin v. Michigan Chamber of Commerce*. Unlike, *MCFL*, SpeechNow.org is unincorporated, and implicates no corrupting basis recognized by the Courts – no nexus to officeholders or candidates, and no ties to labor organizations or corporations, and no business activity – that would require SpeechNow.org to register as a political committee and be subject to contribution limits.

> by the Federal Election Commission. Although the organizational ... restrictions are not invariably an insurmountable burden on speech, *see, e.g., FEC v. National Right to Work Committee*, 459 U.S. 197 (1982), in this case the Government has failed to show that groups such as MCFL pose any danger that would justify infringement of its core political expression.

MCFL, at 266 (J. O'Connor, concurring).

Any and all interests the Commission could legitimately assert for requiring SpeechNow.org to register as a political committee are either inapplicable or addressed by other less burdensome provisions of the Act. Therefore, a proper reading of FECA would not require SpeechNow.org to organize as a political committee under 2 U.S.C. § 432, to register as a political committee under 2 U.S.C. § 433, or file as a political committee under 2 U.S.C. § 434(a).

2. Are donations to SpeechNow.org "contributions" (as defined at 2 U.S.C. § 431(8)) subject to the limits described at 2 U.S.C. § 441a(a)(1)(C)?

Adhering to the contribution limits of 2 U.S.C. §§ 441a(a)(1)(C) is among the obligations of registered political committees. SpeechNow.org believes, however, that whether or not the Commission determines that SpeechNow.org is a political committee, donations to SpeechNow.org cannot be subject to contribution limits as described in 2 U.S.C. § 441a(a)(1)(C)

without violating the Constitution because there is no governmental interest in limiting donations to wholly independent organizations; that is, organizations that operate independently of candidates, political party committees, other political committees, or their agents.

The distinction between governmental regulation of candidate-controlled speech and purely independent speech harkens back to *Buckley v. Valeo*, 424 U.S. 1 (1976). In *Buckley*, the Supreme Court held that both contribution and expenditure limits implicate First Amendment concerns. It subjected the expenditure limits to a higher degree of scrutiny, however, because they "impose significantly more severe restrictions on protected freedoms of political expression and association than [did] limitations on financial contributions" to candidates. *Id.* at 23. Expenditure limits "necessarily reduce[ ] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19.

By contrast, contribution limits to candidates are thought to impose a less significant burden on free expression and are permissible "as long as the Government demonstrates that the limits are 'closely drawn' to match a 'sufficiently important government interest.'" *Randall v. Sorrell*, ___ U.S. ___, ___ 126 S. Ct. 2479, 2491 (2006) (quoting *Buckley*, 424 U.S. at 25). This "less rigorous scrutiny" has also been invoked in the context of contribution limits to political party committees, which are comprised of candidates

and inherently involved with candidates. *McConnell v. FEC*, 540 U.S. 93, 136 n.39 (2003).

However, the Court has only applied this "less rigorous scrutiny" in the context of contributions to candidates and groups that have direct contact with candidates, such as multicandidate PACs and party committees. The Court has been clear that strict scrutiny applies to contribution limits outside of those contexts. In *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley ("CARC")*, the Court considered whether a limitation on contributions to support or defeat a ballot measure could withstand constitutional scrutiny. 454 U.S. 290 (1981). The Court applied "exacting judicial scrutiny" to the regulation, *Id.* at 294, which it has elsewhere defined to mean "strict scrutiny." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (defining "exacting scrutiny" to mean that a restriction can be upheld "only if it is narrowly tailored to serve an overriding state interest.") In reaching this conclusion, the Court noted that freedom of association "is diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective.'" *Id.* at 296. (citing *Buckley*; 424 U.S., at 65-66). Like the potential regulation here, the regulation in *CARC* was triggered "only when contributions are made in concert with one or more others in the exercise of the right of association" *Id.* The Court was clear that "[t]o place a Spartan limit – or indeed any limit – on individuals wishing to band together to advance their

views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association." *CARC*, 454 U.S. at 296. To interpret FECA as allowing sole individuals to make unlimited independent expenditures without registering as committees, while requiring groups of individuals to register, would be to interpret the statute in a manner directly contrary to CARC.

The distinction between *Buckley* and *CARC*'s seemingly contradictory holdings is not whether contributions to ballot measure campaigns convey a different type or degree of speech from contributions to candidates or parties. That is the wrong distinction to consider. *See* John C. Eastman, *Strictly Scrutinizing Campaign Finance Restrictions (and the Courts that Judge Them)*, 50 Cath. U. L. Rev. 13, 35 (2000) (observing that, "[w]hen dealing with independent expenditure committees, drawing the line between the ballot-measure-election and the candidate election simply does not hold analytical water."). Rather, the critical distinction is between independent expenditures (and the contributions that make them possible), on the one hand, and contributions to candidates, on the other. This distinction makes sense because contributions to candidates and contributions to independent expenditure organizations have qualitatively different expressive value. Contributions to independent expenditure organizations *do* convey "a different type or degree of speech" than contributions to candidates or candidate-controlled groups.

As the *Buckley* Court observed, the expression conveyed by a candidate contribution "rests solely on the undifferentiated, symbolic act of contributing," *Buckley*, 424 U.S. at 21. By contrast, an independent expenditure committee "is but the medium through which its individual members seek to make more effective the expression of *their own* views." *NAACP v. Alabama*, 357 U.S. at 459, 78 S. Ct. at 1170 (emphasis added). This distinction, between contributions to independent expenditure organizations and contributions to candidates (or groups associated with candidates), is the difference between citizens banding together at the grassroots to directly fund the expression of their own views, and merely facilitating a candidate's expression of the candidate's views. *Compare California Medical Association v. FEC*, 453 U.S. 182, 196 (1981) (upholding contribution limits to multicandidate PACs and suggesting that "'speech by proxy' . . . is not the sort of political advocacy . . . entitled to full First Amendment protection"), *with FEC v. Nat'l Conservative PAC (NCPAC)*, 470 U.S. 480, 495 (1985) ("[T]he 'proxy speech' approach is not useful in this case [because] the contributors obviously like the message they are hearing from these organizations and want to add *their voices* to that message; otherwise they would not part with their money") (emphasis added).

In the question posed, Commission regulation would limit contributions to SpeechNow.org, an independent committee that *only* engages in independent

expenditures. Neither candidates nor candidate-associated groups are the recipients of these funds. Instead, regulating SpeechNow.org as a political committee subject to contribution limits would directly limit the ability of citizens to pool their resources and amplify their own voices, a right that is "entitled to full First Amendment protection."[17] *NCPAC*, 470 U.S. at 495. Thus, the question is subject to *CARC's* "exacting," or "strict," scrutiny. *See also Righeimer v. City of Huntington Beach*, No. SACV94-676 (C.D. Cal. Oct. 13, 1994) (denying, on associational freedom grounds, a motion to dismiss in case involving an ordinance that limited a committee's ability to make independent expenditures if it accepted more than $300 from an individual in an election cycle); *San Franciscans for Sensible Gov't v. Renne*, No. 99-02456 (ND. Cal. Sept. 8 1999) (granting preliminary injunction against ordinance placing contribution limits upon committee making independent expenditures).

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[17] The Eastern District of North Carolina recently considered the same issue: Can the State place a contribution limit on "NCRL*C*-FIPE . . . an internal PAC established by NCRL whose sole purpose is to make independent expenditures[?]" *North Carolina Right to Life v. Leake*, No. 5:99-CV-798-BO(3) (ED NC Mar. 29, 2007). The district court determined that "NCRL*C*-FIPE makes no contributions of any kind to candidates," then held that "it is well established that limiting corruption or the appearance of corruption is a sufficiently important or compelling state interest," and that the State "failed to present any evidence that the independent expenditures made by [an independent expenditure political action committee] have a tendency to corrupt or create the appearance of corruption." *Id.*

Even under "less rigorous review," contribution limits are permissible only if those limits are "closely drawn," to match a "sufficiently important government interest." *Randall v. Sorrell*, ___ U.S. ___, ___, 126 S. Ct. 2479, 2491 (2006) (plurality opinion) (quoting *Buckley*, 424 U.S. at 25). This is not cursory review and, to date, the Supreme Court has identified one, and only one, government interest "sufficiently important" to justify contribution limits: combating corruption of officeholders or the appearance of such corruption. Moreover, since *Buckley*, the Court has repeatedly shown that it will only find corruption or its appearance in situations that involve contributions to candidates or to groups intimately associated with candidates.[18] The Supreme Court has found that these are the only financial contributions that create the likelihood that *quid pro quo* arrangements will take place or that create "the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." *Buckley*, 424 U.S. at 25; *id.* at 28 (1976) ("The Act's $1,000 contribution limitation focuses precisely

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[18] The one, narrow exception to this statement, so called "corporate-form corruption," is not applicable to this case. *See, Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (identifying the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas" as "a different type of corruption").

on the problem of large *campaign* contributions – *the narrow aspect of political association where the actuality and potential for corruption have been identified* – while leaving persons free to engage in independent political expression. . . . " (emphasis added)).

This required candidate nexus was reaffirmed five years after *Buckley* in *California Medical Association v. Federal Election Commission*, 453 U.S. 182 (1981). In that case, the Supreme Court considered the constitutionality of a $5,000 limit on contributions to a multicandidate political action committee, an organization that, by definition, made candidate contributions. The Court upheld the limit after considering several challenges to the law, but with regard to the First Amendment question, it mustered only a four-member plurality, Justice Blackmun concurred with the result reached by the plurality and provided the fifth vote, but did so on narrower grounds, which control. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

Justice Blackmun accepted, as a matter of *stare decisis*, that the contribution limits in *Buckley v. Valeo* were constitutional. *Id.* at 201-02. He continued, however, that "it does not follow that I must concur in the plurality conclusion today that political contributions are not entitled to full First Amendment protection." Applying the "rigorous standard of review," Justice Blackmun concluded that "contributions to multicandidate political committees may be limited to $5,000 per year as a means of preventing evasion of the limitations on contributions," though it

was a "close[ ] question." *Id.* at 202. However, he cautioned that "a different result would follow if [the statute] were applied to contributions to a political committee *established for the purpose of making independent expenditures*, rather than contributions to candidates" because "contributions to a committee that makes only independent expenditures pose no such threat [of corruption]." *Id* at 203; *accord, NCPAC*, 470 U.S. at 498 ("the absence of prearrangement and coordination [with a candidate] . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate").

This required nexus was reaffirmed again in *McConnell v. FEC*. In that case, the Supreme Court upheld contributions to *party* committees because such committees are composed of candidates, and are direct funnels to candidates. 540 U.S. at 156-157 n. 51 (2003) ("Thus . . . we rely not only on the fact that they regulate contributions used to fund activities influencing federal elections, but also that they regulate contributions to, or at the behest of, entities uniquely positioned to act as conduits for corruption). Indeed, the Court explicitly rejected the argument that the majority's holding would allow Congress to restrict the funding of independent activity that merely benefits a candidate. *See, Id.* ("Congress could not regulate financial contributions to political talk show hosts or newspaper editors on

the sole basis that their activities conferred a *benefit* on the candidate.") (emphasis in original).[19]

Justice Kennedy's discussion in *McConnell* is also instructive on this point. There, he noted that, quite apart from whether a candidate benefits, a contribution limit could not "withstand constitutional challenge unless it was shown to advance the anti-corruption interest." *McConnell v. FEC*, 540 U.S. at 291-292. As Justice Kennedy put it: "To ignore the fact that in *Buckley* the money at issue was given to candidates, creating an obvious *quid pro quo* danger . . . is to ignore the Court's comments in Buckley that show *quid pro quo* was of central importance to the analysis." *Id.* at 295-96

As one leading commenter put it, "the Supreme Court has never said that benefit to the candidate, with the inference that the candidate will be grateful for the benefit and will be tempted to provide favors accordingly, is enough to support regulation of campaign money. *McConnell* clearly held that *benefit (even benefit followed by gratitude and temptation is not sufficient to justify a campaign restriction.*"

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[19] That the independent groups addressed were members of the institutional press is of no constitutional significance. "The purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it ' . . . the liberty of the press is no greater and no less . . . ' than the liberty of every citizen of the Republic. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 802 (1978) (Burger, C.J., concurring) (citing *Pennekamp v. Florida*, 328 U.S. 331, 364 (1946).

Richard Brifault, *The 527 Problem . . . and the Buckley Problem*, 73 Geo. Wash. L. Rev. 1701, 1745 (2005) (emphasis added). Nor would it be sufficient to show that candidates respond to independent expenditures by changing their positions on issues, for "the fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political message . . . can hardly be called corruption." *NCPAC*, 470 U.S. at 498. Indeed, far from being corruption, "the presentation to the electorate of varying points of view" is "one of the essential features of democracy." *Id.*

3. Must an individual donor to SpeechNow.org count his donations to SpeechNow.org among the "contributions" applicable to his individual biennial aggregate contribution limit described at 2 U.S.C. § 441a(a)(3)?

As discussed above, SpeechNow.org believes that whether or not the Commission determines that SpeechNow.org must register as a political committee, donations to SpeechNow.org cannot be subject to contribution limits, as described in 2 U.S.C. § 441a(a)(1)(C), without violating the Constitution. If a donation is not a "contribution" for purposes of the limits described in § 441a(a)(1)(C), then individuals who donate to SpeechNow.org need not count those donations among contributions subject to a biennial aggregate limit, as described in 2 U.S.C. § 441a(a)(3).

V. Conclusion

SpeechNow.org will make independent expenditures, as defined at 2 U.S.C. § 431(17), paid for with funds raised solely from individuals. It will place disclaimers on its written solicitations in compliance with 2 U.S.C. § 441d(a), and to place disclaimers on its independent expenditures in compliance with 2 U.S.C. § 441d(d)(2). SpeechNow.org will report its independent expenditures according to the provisions for non-political committees in 2 U.S.C. § 434(c).

SpeechNow.org seeks the Commission's guidance on whether and if so when it must organize as a political committee under 2 U.S.C. § 432, register as a political committee under 2 U.S.C. § 433, or report as a political committee under 2 U.S.C. § 434(a).

Further, if the Commission determines that SpeechNow.org must register as a political committee, SpeechNow.org asks whether the donations it receives are subject to the contribution limits described in 2 U.S.C. § 441a(a)(1)(C), and whether individuals who donate to SpeechNow.org must count their donations to SpeechNow.org among the contributions subject to a biennial aggregate limit, as described in 2 U.S.C. § 441a(a)(3).

The undersigned await the Commission's guidance in this matter. Thank you for your consideration

of this request. Please direct any further inquiries or requests for additional information to Steve Hoersting or Steve Simpson.

Respectfully submitted,

/s/ S M Hoersting

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/s/

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[SEAL] FEDERAL ELECTION COMMISSION
Washington, DC 20463

January 28, 2008

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

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RE: Advisory Opinion Request 2007-32

Dear Messrs. Smith, Hoersting, Mellor, Simpson, and Sherman:

This letter responds to your letters received on November 19, 27, and 29, 2007, requesting an advisory opinion on behalf of SpeechNow.org.

On January 22, 2008, the Commission released for public comment Agenda Document No. 08-04, which contains a draft advisory opinion responding to your request. Under the Federal Election Campaign Act of 1971, as amended ("the Act"), the affirmative vote of 4 members of the Commission is required in order for the Commission to render an advisory

opinion. *See* 2 U.S.C. 437c(c) and 437d(a)(7); *see also* 11 CFR 112.4(a). As you know, the Commission currently has only two members. On January 24, 2008; the Commission discussed Agenda Document No. 08-04 and voted 1-1 on a motion to approve the draft. Thus, the Commission was unable to render an opinion in this matter.

A draft advisory opinion that is identical to Agenda Document No. 08-04, but contains technical amendments to citations, is enclosed for your convenience. Neither this document nor Agenda Document No. 08-04 should be considered an advisory opinion by the Commission or any of its employees because the Commission may issue such an opinion only in accordance with specific provisions of the Act. *See* 2 U.S.C. 437f(b). Also enclosed for your convenience is the Dissenting Opinion of Chairman David M. Mason in Advisory Opinion Request 2007-32.

Accordingly, you are hereby advised that the Commission has concluded its review of Advisory-Opinion Request 2007-32. You are not precluded from resubmitting the same or a similar request for an advisory opinion at such time as the Commission is able to take action on advisory opinion requests.

Sincerely,

/s/ Rosemary C. Smith
Rosemary C. Smith
Associate General Counsel

Enclosures

ADVISORY OPINION 2007-32

DRAFT

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Dear Messrs. Smith, Hoersting, Mellor, Simpson, and Sherman:

We are responding to your advisory opinion request on behalf of SpeechNow.org ("SpeechNow") concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act" or "FECA"), and Commission regulations to SpeechNow's status as a political committee and funds received by SpeechNow.

The Commission concludes that once SpeechNow receives in excess of $1,000 in contributions or makes in excess of $1,000 in expenditures in one calendar year, it would satisfy the statutory definition of "political committee" and would have to register as a political committee because its major purpose is Federal campaign activity. The Commission also concludes that funds received by SpeechNow would

constitute contributions, as defined in the Act and Commission regulations, and would be subject to the Act's amount limitations on individuals' contributions to political committees, including the individual biennial aggregate contribution limit.

Background

The facts presented in this advisory opinion are based on your letters received on November 19, 27, and 29, 2007, and information on SpeechNow's website.[1]

SpeechNow is organized under the laws of the District of Columbia as an unincorporated non-profit association and under Section 527 of the Internal Revenue Code. SpeechNow is dedicated to "promoting and protecting Americans' First Amendment right of free speech, association, and assembly." Its "mission and major purpose is to advocate the election of candidates – in the 2008, 2010, and future federal election cycles – who favor returning America to the state of political freedom and advocate the defeat of candidates who favor speech restrictions in the name of campaign finance reform."

SpeechNow was founded by five individuals who are SpeechNow's only participants. Other individuals may join the organization if elected to join by the current participants. SpeechNow will operate and

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[1] www.SpeechNow.org (last viewed on Jan. 9, 2008).

conduct its activities wholly independently of candidates, political party committees, and other political committees. Provisions of its bylaws ("Bylaws") prohibit SpeechNow and its participants from certain activities that might compromise the independence of its activities, such as using a vendor that is also used by a Federal candidate, hiring a former employee of a Federal candidate, or communicating with candidates about their campaign needs or SpeechNow's activities. *See* Bylaws Art. X. SpeechNow will not make any contribution to any candidate or political committee. *See* Bylaws Art. VI, Sec. 10.

SpeechNow will rely solely on funds from individuals to pay for its activities and administrative costs. Four individuals have already indicated they would like to give amounts ranging from $5,500 to $110,000, and SpeechNow would like to accept these funds. To date, however, SpeechNow has accepted less than $1,000 total. SpeechNow will not accept any funds from candidates, and will not accept, directly or indirectly, any funds or anything of value from political committees or from corporations, labor organizations, national banks, Federal government contractors, or foreign nationals.

SpeechNow plans to solicit individuals using two proposed solicitations ("Solicitation 1" and "Solicitation 2") that request that individuals give their "maximum" amount to SpeechNow and that state that SpeechNow "operate[s] independently of any candidate and expressly advocate[s] to other people to

vote for federal candidates who support these First Amendment rights and to vote against candidates who oppose such rights." The two proposed solicitations are identical, except that Solicitation 2 also states that SpeechNow plans to oppose the election of two specific Federal candidates, Representative Dan Burton and Senator Mary Landrieu, in the 2008 election.

During the 2008 election, SpeechNow plans to pay for political advertisements supporting and opposing four specific Federal candidates. It has prepared four political advertisement scripts, and the company retained to produce the proposed advertisements and reserve television airtime, The Traz Group, estimates production costs to be $12,000 and the cost of airing the advertisements to exceed $150,000.

SpeechNow plans to place "disclaimers" on its solicitations and political advertisements in accordance with 2 U.S.C. 441d(d)(2), and to report its spending for its political advertisements as "independent expenditures" in accordance with 2 U.S.C. 434(c).

Questions Presented

1. *Are funds received and amounts disbursed by SpeechNow "contributions" and "expenditures" under 2 U.S.C. 431(8) and 431(9)?*

2. *Must SpeechNow register as a political committee:*

   a. *Before accepting "contributions," or making "expenditures," in excess of $1,000 because its major purpose is to influence the election or defeat of candidates for Federal office?*

   b. *After it has received more than $1,000 from individuals who are informed that the purpose of SpeechNow is to influence elections through advocacy for or against the election of clearly identified candidates, but before it has made "expenditures" in excess of $1,000?*

   c. *After making "expenditures" in excess of $1,000?*

3. *What amount limitations apply to funds received by SpeechNow from individuals?*

Legal Analysis and Conclusions

Question 1: Are funds received and amounts disbursed by SpeechNow "contributions" and "expenditures" under 2 U.S.C. 431(8) and 431(9)?

Yes, funds received by SpeechNow would be contributions and amounts disbursed by SpeechNow would be expenditures under the Act and Commission regulations.

A. Contributions

Under the Act and Commission regulations, a "contribution" is "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." *See* 2 U.S.C. 431(8)(A)(i); 11 CFR 100.52(a). The Act does not define the phrase "for the purpose of influencing any election for Federal office."

Commission regulations provide that funds received in response to solicitations must be treated as contributions "if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate."[2] 11 CFR 100.57(a); *see also Political Committee Status, Definition of Contribution and Allocation for Separate Segregated Funds and Nonconnected Committees; Final Rules*, 69 FR 68056, 68057 (Nov. 23, 2004) ("*Political Committee Status Final Rules*").

SpeechNow proposes to solicit funds with two proposed communications, Solicitation 1 and Solicitation 2, that contain identical language describing SpeechNow and its purpose as follows:

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[2] A Federal candidate is "clearly identified" if the candidate's name, nickname, photograph, or drawing appears in the communication, or if the identity of the candidate is otherwise apparent through an unambiguous reference to the person's status as a candidate, such as "the Democratic presidential nominee." *See* 11 CFR 100.17.

> SpeechNow.org is an independent speech group of individuals dedicated to promoting and protecting our First Amendment rights to free speech and for the freedom to assemble. We operate independently of any candidate and expressly advocate to other people to vote for federal candidates who support these First Amendment rights and to vote against candidates who oppose such rights.

Solicitation 1 and Solicitation 2 state that "the best way" to achieve SpeechNow's purpose is:

> to speak out when politicians and the voters are most likely to pay attention. That's election time. We need to tell our fellow Americans who supports, and who opposes, free speech and the First Amendment. We need to defeat some candidates who are against free speech and elect the ones who support the First Amendment. That will take money. A lot of it.

Solicitation 2 contains additional language stating that SpeechNow plans to run advertisements to defeat two Federal candidates in 2008: Louisiana Senator Mary Landrieu and Congressman Dan Burton from Indiana. Because Solicitation 2 indicates that funds received will be used to oppose the election of two Federal candidates clearly identified by name, money received in response would constitute contributions under 11 CFR 100.57(a).

Because Solicitation 1 does not include an indication that the funds received in response will be used to support or oppose the election of a clearly identified Federal candidate, money received in response to Solicitation 1 would not constitute contributions under 11 CFR 100.57(a). The Commission has emphasized, however, that 11 CFR 100.57 provides "one example of communications that can generate contributions; it is not an exhaustive list. The rule addresses communications that indicate that the funds received in response will be used to support or oppose the election of a clearly identified Federal candidate. Other communications that do not include such an indication may also generate contributions under FECA." *Political Committee Status Final Rules*, 69 FR at 68058. Solicitation 1 asks individuals to give money to SpeechNow so that SpeechNow can work to elect and defeat Federal candidates. Money given to work to elect and defeat Federal candidates would be "for the purpose of influencing any election for Federal office," and thus would constitute a contribution under 2 U.S.C. 431(8)(A)(i) and 11 CFR 100.52(a).

In addition, any funds received from the four individuals who have indicated they would like to give amounts ranging from $5,500 to $110,000 would also constitute contributions under the Act and Commission regulations. Each individual acknowledges in a signed declaration that he understands that funds given to SpeechNow "will be used to fund speech, including advertisements that will advocate the election or defeat of candidates to federal office

based on their position on freedom of speech and campaign finance laws." Accordingly, any such funds given to SpeechNow would be made "for the purpose of influencing any election for Federal office." 2 U.S.C. 431(8)(A)(i); 11 CFR 100.52(a).

B. Expenditures

Under the Act and Commission regulations, an "expenditure," is a "purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." *See* 2 U.S.C. 431(9)(A)(i); 11 CFR 100.111(a). The Supreme Court has held that the term "expenditure," when applied to communications made wholly independently of a candidate or candidate's committee, includes only "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Buckley v. Valeo*, 424 U.S. 1, 44 (1976); *see also id.* at 80.

Under Commission regulations, a communication contains express advocacy when it uses phrases such as "vote for the President," "re-elect your Congressman," or "Smith for Congress," or uses campaign slogans or words that in context have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates, such as posters, bumper stickers, or advertisements that say, "Nixon's the One," "Carter '76," "Reagan/Bush," or "Mondale!" *See* 11 CFR 100.22(a); *see also*

FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 249 (1986) ("MCFL") ("[The publication] provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than 'Vote for Smith' does not change its essential nature"). Courts have held that "express advocacy also includes verbs that exhort one to campaign for, or contribute to, a clearly identified candidate." *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 62 (D.D.C. 1999) (explaining why *Buckley*, 424 U.S. at 44 n.52, included the word "support," in addition to "vote for" or "elect," in its list of examples of express advocacy).

SpeechNow plans to fund the creation of four proposed political advertisements (the "Burton Ad," the "Alternative Burton Ad," the "Landrieu Ad," and the "Alternative Landrieu Ad") and pay to air them on television, independently of a candidate or a candidate's committee. All four advertisements contain audio and video content. The audio portions of the advertisements are as follows:

> *Burton Ad*:
>
> Free speech is so important, it's the First Amendment to the Constitution. But politicians like Dan Burton don't like free speech. Burton voted for a bill to restrict the speech of many public interest groups. Under this bill you could go to jail for criticizing politicians. Hey Dan Burton. This is America, not Russia. But we still have the right to vote.

Say no to Burton for Congress. Say no to censorship.

Alternative Burton Ad:

We've all seen the fight for free speech around the world. Lately, free speech has come under attack right here in America. Thanks to politicians like Dan Burton. Burton voted for a bill to restrict the speech of many public interest groups. Under this bill you could go to jail for criticizing politicians. Our founding fathers made free speech the First Amendment to the Constitution. Dan Burton voted to restrict our rights. Don't let him do it again.

Landrieu Ad:

Free speech is so important, it's the First Amendment to the Constitution. But politicians like Mary Landrieu don't like free speech. Landrieu voted for the law restricting the speech of public interest groups. People can now go to jail for violating her law that protects politicians from criticism. Hey Mary Landrieu. This is America, not Russia. But we still have the right to vote. Say no to Landrieu for Senate. Say no to censorship.

Alternative Landrieu Ad:

We've all seen the fight for free speech around the world. Lately, free speech has come under attack right here in America. Thanks to politicians like Mary Landrieu. Landrieu helped pass the law restricting the speech of many public interest groups. Under

> this law you could go to jail for criticizing politicians. Our founding fathers made free speech the First Amendment to the Constitution. Mary Landrieu is taking that right away. Don't let her do it again.

The video portions of the Burton Ad and the Alternative Burton Ad both show a picture of Congressman Burton and include text that states "Say no to Burton for Congress." The video portions of the Landrieu Ad and the Alternative Landrieu Ad both show a picture of Senator Landrieu and include text that states "Say no to Landrieu for Senate."

The phrases "Say no to Burton for Congress" and "Say no to Landrieu for Senate" constitute express advocacy under the Commission regulations because they have no other reasonable meaning than to urge the defeat of the candidate clearly identified by name and by picture. *See* 11 CFR 100.22(a). Accordingly, all four advertisements contain express advocacy, and funds spent on these advertisements would constitute expenditures under the Act and Commission regulations.

Question 2: Must SpeechNow register as a political committee:

> *a. Before accepting "contributions," or making "expenditures," in excess of $1,000 because its major purpose is to influence the election or defeat of candidates for Federal office?*

b. *After it has received more than $1,000 from individuals who are informed that the purpose of SpeechNow is to influence elections through advocacy for or against the election of clearly identified candidates, but before it has made "expenditures" in excess of $1,000?*

c. *After making "expenditures" in excess of $1,000?*

SpeechNow would have to register as a political committee once it has either received contributions in excess of $1,000 or made expenditures in excess of $1,000, in a calendar year, because it would satisfy the statutory definition of "political committee" and its major purpose is Federal campaign activity. SpeechNow need not, however, register as a political committee before receiving contributions or making expenditures exceeding either of these thresholds solely because its major purpose is Federal campaign activity.

Definition of Political Committee

The Act and Commission regulations, with certain exceptions, define a "political committee" as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." *See* 2 U.S.C. 431(4)(A); 11 CFR 100.5(a). Under the Act and Commission

regulations, political committees are subject to certain registration and reporting requirements, as well as limitations and prohibitions on contributions received and made. Once an organization receives more than $1,000 in contributions or makes more than $1,000 in expenditures, in a calendar year, it satisfies the statutory definition of "political committee."

The Supreme Court has held that "[t]o fulfill the purposes of the Act" and avoid "reach[ing] groups engaged purely in issue discussion," only organizations whose major purpose is Federal campaign activity can be considered political committees under the Act. *See Buckley*, 424 U.S. at 79; *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986).

Accordingly, SpeechNow would have to register as a political committee if it satisfies the statutory definition of "political committee" and its major purpose is Federal campaign activity.

A. Statutory Definition of "Political Committee"

1. Receiving contributions in excess of $1,000 in a calendar year

As explained above in response to Question 1, funds received in response to Solicitation 1 and Solicitation 2, and funds from the four individuals who would like to give amounts ranging from $5,500 to $110,000, would constitute contributions under the Act and Commission regulations. Thus, once

SpeechNow receives more than $1,000 in a calendar year in response to these solicitations, or from the four individuals, it would meet the statutory definition of a "political committee."

2. Making expenditures in excess of $1,000 in a calendar year

As explained above in response to Question 1, SpeechNow's proposed political advertisements contain express advocacy and funds spent on these advertisements would be expenditures under the Act and Commission regulations. Thus, once SpeechNow spends more than $1,000 in a calendar year on these advertisements, it would meet the statutory definition of a "political committee."

B. Major Purpose

An organization's "major purpose" may be established through public statements of purpose. *See, e.g., FEC v. Malenick*, 310 F. Supp. 2d 230, 234-36 (D.D.C. 2004) (finding that the organization evidenced its "major purpose" through its own materials which stated the organization's goal of supporting the election of Republican Party candidates for federal office and through efforts to get prospective donors to consider supporting federal candidates); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996) ("organization's [major] purpose may be evidenced by its public statements of its purpose or by other means"); Advisory Opinion

2006-20 (Unity 08) (organization evidenced its major purpose through organizational statements of purpose on Web site).

SpeechNow's major purpose is Federal campaign activity. SpeechNow makes clear in its advisory opinion request, and through its proposed solicitations and other proposed communications, that its "mission and major purpose is to advocate the election of candidates . . . and advocating the defeat of candidates." Advocating the election and defeat of candidates constitutes campaign activity.[3] In its Internal Revenue Service Form 8871 (Political Organization Notice of Section 527 Status), its bylaws, and its articles of organization, SpeechNow clearly states this purpose: "We operate independently of any candidate and expressly advocate to other people to vote for federal candidates who support these First Amendment rights and vote against candidates who oppose such rights." In addition, SpeechNow plans to continue making similar statements of its purpose in its proposed solicitations, discussed above, which confirms that its major purpose is Federal campaign activity.

Therefore, because its major purpose is Federal campaign activity, SpeechNow would have to register as a political committee once it either (1) receives

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[3] *See Buckley v. Valeo*, 424 U.S. 1, 79 (the term "political committee" encompasses organizations "the major purpose of which is the nomination or election of a candidate").

more than $1,000 in a calendar year in response to its proposed solicitations or from the four individuals who pledged donations, or (2) spends more than $1,000 in a calendar year on its proposed advertisements. SpeechNow would have to file a statement of organization within 10 days of becoming a political committee, *see* 11 CFR 102.1(d) and 102.2, and it would be subject to all provisions of the Act and Commission regulations applicable to political committees.

Question 3: What amount limitations apply to funds received by SpeechNow from individuals?

Because amounts given to SpeechNow would be contributions, as explained above in response to *Question 1*, they would count towards the contribution limitations in the Act and Commission regulations, including the individual biennial aggregate contribution limit.

The Act and Commission regulations prohibit a person from making a contribution in excess of $5,000 to a political committee that is not an authorized committee, a political committee of a national political party, or a political committee of a State political party. *See* 2 U.S.C. 441a(a)(1); 11 CFR 110.1(d). The Act and Commission regulations also limit the total amount of contributions an individual may make to candidates and political committees within a two-year period, known as the individual aggregate biennial contribution limit. *See* 2 U.S.C. 441a(a)(3); 11 CFR 110.5(b)(1). Under the individual

aggregate biennial contribution limit for the 2007-2008 election cycle, an individual may make no more than $108,200 in total contributions to candidates and political committees, including up to $42,700 in contributions to political committees that are not authorized committees and are not political committees of the national political parties.[4] *See id.*; *Price Index Increases of Expenditure and Contribution Limitations: Notice of Expenditure and Contribution Limitation Increases*, 72 FR 5294, 5295 (Feb. 2007).

Once SpeechNow becomes a political committee, it would not be an authorized committee or a political committee of a national or State political party. *See* 2 U.S.C. 431(6) (definition of authorized committee); 11 CFR 100.5(e)(4) and (f)(1) (definitions of authorized committee and party committee). Therefore, contributions to it would be subject to the $5,000 amount limitation in 2 U.S.C. 441a(a)(1)(C) and 11 CFR 110.1(d) and would count towards the $42,700 in total contributions that each individual may make to political committees that are not authorized committees and are not political committees of the national political parties and the $108,200 in total contributions to all candidates and political committees. *See* 2 U.S.C. 441a(a)(3); 11 CFR 110.5(b)(1).

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[4] These figures reflect the statutory figures adjusted to account for increases in the consumer price index. *See* 2 U.S.C. 441a(c)(1); 11 CFR 110.5(b)(3) and 110.17.

Commission regulations prohibit a political committee from knowingly accepting any contribution in excess of the Act's amount limitations, including the individual biennial aggregate contribution limit. *See* 11 CFR 110.9. Accordingly, SpeechNow may not accept any contribution that would cause an individual to exceed $5,000 in total contributions to SpeechNow, $42,700 in total contributions to political committees that are not authorized committees and are not political committees of the national political parties, or $108,200 in total contributions to all candidates and political committees.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requester may not rely on that conclusion as support for its proposed activity. The cited advisory opinion is available on the Commission's website at http://saos.nictusa.com/saos/searchao.

Sincerely,

David M. Mason
Chairman

[SEAL OMITTED]

THE FEDERAL ELECTION COMMISSION
Washington, DC 20463

DISSENTING OPINION OF CHAIRMAN DAVID M. MASON IN ADVISORY OPINION REQUEST 2007-32

Draft Advisory Opinion 2007-32 for SpeechNow.org ("SpeechNow") proposed to conclude that SpeechNow would satisfy the statutory definition of a "political committee" and would be required to register as such. I agree with the analysis of the Office of General Counsel as set forth in the draft advisory opinion as to SpeechNow's statutory status and its obligation to register and file reports with the Commission. The draft also recommended concluding that donations received by SpeechNow would constitute "contributions" and would be subject to the Act's amount limitations on individuals' contributions to political committees, including the individual biennial aggregate contribution limit. I do not believe the Commission may, consistent with the Constitution and with Supreme Court decisions on independent political spending, enforce the FECA's $5,000 limit on contributions to political committees which limit their activities exclusively to independent spending, nor may we apply the individual aggregate limit to such contributions. I write separately to express my views on the authority of the Commission to make constitutional determinations in such matters and on issue of contribution limits.

I. Constitutional Questions

Certain commentors have expressed the concern that advisory opinions are not for the purpose of declaring portions of the Federal Election Campaign Act (the "Act") unconstitutional. It is black letter law that "adjudication of the constitutionality of congressional enactments [is] beyond the jurisdiction of administrative agencies." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (quoting *Johnson v. Robison*, 415 U.S. 361, 367-68 (1974)). However, an agency may be "influenced by constitutional considerations in the way it interprets or applies statutes." *Branch v. FCC*, 824 F.2d 37, 47 (C.A.D.C. 1987). Indeed, the Commission makes these considerations every day in carrying out its statutory obligations.[1]

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[1] *See, e.g.*, Advisory Opinion (AO) 1998-20 (*Fulani*) (F.E.C. Nov. 4, 1998) (relying on *Buckley v. Valeo*, 424 U.S. 1 (1976), to make a constitutional distinction between a candidate's funds and contributions from others); AO 2003-02 (*Socialist Workers Party*) (F.E.C. April 4, 2003) (Commission applied disclosure exemption based on constitutional principles); AO 2003-33 (*Cantor*) (F.E.C. April 29, 2003) (citing Commission's earlier rulemaking as basis for constitutional concern); AO 2006-32 (*Progress for America*) (F.E.C. Nov. 21, 2006) (dismissing matter, but noting the importance of the major purpose test as a constitutional consideration). *See also* Statement of Reasons (SOR) by Commissioners Darryl P. Wold, Lee Ann Elliott, and David M. Mason in Matter Under Review (MUR) 4250 (*Republican National Committee*) (F.E.C. Feb. 11, 2000) (directing the Commission to read the Act narrowly because it impinges on protected First Amendment liberties); SOR by Commissioner Sandstrom in MUR 4620 (*The Coalition*) (F.E.C. Sept. 6, 2001) ("the Commission must be mindful of

(Continued on following page)

In the past, the Commission has exempted certain organizations from disclosure requirements due to constitutional concerns. In *Buckley v. Valeo*, 424 U.S. 1, 71-72 (1976), the United States Supreme Court recognized that some disclosure requirements under the Act would be unconstitutional as applied to minor parties because of the possibility of threats, harassment, or reprisals. *See also Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982). Because of those constitutional concerns, the Commission undertook constitutional considerations and exempted minor parties from disclosure requirements. *See* AO 2003-02, *Socialist Workers Party* (F.E.C. April 4, 2003).[2] In a similar manner, and as

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constitutional constraints); Additional SOR by Commissioner Michael E. Toner in MUR 4735 (*Bordonaro for Congress*) (F.E.C. Dec. 1, 2003) (indicating the Commission has a duty to be sensitive to constitutional concerns when interpreting and enforcing the Act); SOR by Commissioner David M. Mason in MUR 4741 (*Mary Bono Committee*) (F.E.C. April 7, 1999) (expressing concern over the constitutionality of 2 U.S.C. § 441d(a)); Additional SOR by Commissioner David M. Mason in MUR 4766 (*Phillip Morris Companies, Inc.*) (F.E.C. May 5, 2000) (raising the issue of the speech or debate clause as a matter of constitutional immunity); SOR by Commissioner Bradley A. Smith in SOR 5275 (F.E.C. March 30, 2004) (advising the Commission to tread lightly on the matter of anonymous speech under the First Amendment); SOR of Commissioner Weintraub in MURs 5540, 5545, 5562, 5570 (*CBS Broadcasting, Inc.*) (F.E.C. July 12, 2005) ("merely investigating" allegations of fairness or accuracy "would intrude upon Constitutional guarantees of freedom of the press").

[2] Likewise, some commissioners have expressed doubt over the constitutionality of applying 2 U.S.C. § 441d(a) against

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discussed more thoroughly in Part II below, because of well-stated concerns about the unconstitutional burden made by limiting contributions to organizations engaged in speech wholly independent of candidates, the Commission is empowered to grant a similar exemption here.

SpeechNow seeks the Commission's advice on the application of the law to particular activities. It does not ask the Commission to declare a statute unconstitutional – an action beyond the jurisdiction of this Commission. It comes as no surprise that the Commission makes these types of constitutional applications as a matter of regular course. By engaging in rulemaking, providing answers to advisory opinion requests, and ruling on enforcement matters, the Commission makes constitutionally-governed decision making in its day-to-day operations. *See Electioneering Communications*, 72 Fed. Reg. 72899 (F.E.C., Dec. 26, 2007); Advisory Opinion 1990-13, *Socialist Workers Party* (F.E.C., Aug. 21, 1990) MUR 5754; MoveOn.org Voter Fund (F.E.C., Dec. 13, 2006).

Moreover, commissioners take an oath to support and defend the Constitution. In doubtful cases of law, the Commission is instructed to "err on the side of protecting political speech rather than suppressing

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citizens of modest means who act independently of a candidate." *See* SOR of Commissioner Darryl R. Wold in MUR 5156 (*Morton*, et al.) (F.E.C. March 22, 2002).

it." *FEC v. Wisconsin Right to Life, Inc. (WRTL II)*, 127 S. Ct. 2652, 2659 (2007). Indeed, in *Shays v. FEC*, the district court required that the Commission undertake a *more thorough* analysis of First Amendment concerns to survive review. 337 F. Supp. 2d 28, 79, 86-87 (D.D.C 2004). The Commission is mindful of these instructions when considering the application of the Act to matters before it.

Under the Act, the Congress established the Commission with specifically enumerated powers as an independent agency to perform just the type of constitutional determination that SpeechNow requests. *See* 2 U.S.C. §§ 437d, 437f, 437g, 438. It is not only within the discretion of the Commission to make such determinations; the Commission possesses an independent obligation to do so. As President Lincoln reminded citizens of this nation in his first inaugural address:

> I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent

> for other cases, can better be borne than could the evils of a different practice. At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.

Lincoln's First Inaugural Speech (Mar. 4, 1861), in Bartleby's Great Books Online, available at http://www.bartleby.com/124/pres31.html

The Commission is equally mindful that courts are not the sole mechanism through which constitutional determinations may be made. It is the duty of this Commission, pursuant to its statutory grant of authority by Congress, to consider these very questions.

II. Contribution Limits Applied to Grassroots Organizations Engaged Solely in Independent Speech are Inapplicable Under the First Amendment

The United States Supreme Court recognizes that speech like that made by SpeechNow – citizens banded together in grassroots organizations – is protected at the very core of the First Amendment. *FEC v. Massachusetts Citizens for Life (MCFL)*, 479

U.S. 238, 256 (1986) n.9 (independent spending is "core political speech protected under the First Amendment"). SpeechNow is but one manifestation of this phenomenon where "individual members seek to make more effective the expression of their own views." *NAACP v. Alabama*, 357 U.S. 449, 459 (1958). Here, money given to SpeechNow funds the expression of members' views; it does not facilitate candidates' views. *See California Medical Ass'n v. FEC (Cal-Med)*, 453 U.S. 182, 196 (1981). Placing limits on the money given to independent organizations serves only to limit speech – an unjustifiable result in a Republic with a profound commitment to the principle that debate should be "uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

The distinction between candidate coordinated speech and independent speech is of constitutional significance. The Supreme Court has recognized government interests in limiting corruption, or its appearance, only when that spending is connected or coordinated with candidates for public office or, in a very limited manner, because of the corporate form. *See Buckley*, 424 U.S. 1; *MCFL*, 479 U.S. 238; *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

Limiting the contribution limits given to an organization like SpeechNow would impose an intolerable, and constitutionally unjustifiable, burden on the independent spending of this citizen organization.

See Buckley, 424 U.S. at 47-48 (while the "independent expenditure ceiling thus fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process, it heavily burdens core First Amendment expression"); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299 (1981) (restrictions on expenditures "plainly impair[] freedom of expression").

This organization operates autonomously without connection or coordination with candidates, political party committees, other political committees or their agents. It does not make any contributions to candidates. Limiting donations to organizations that are wholly independent of candidates and political party committees serves no recognizable government interest. *See Cal-Med*, 453 U.S. at 203 (Blackmun, J., concurring) ("contributions to a committee that makes only independent expenditures pose no such threat [of actual or perceived corruption]").[3] Hindering contributions to SpeechNow furthers no interest in preventing real or apparent corruption – for the organization is autonomous and does not

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[3] Justice Blackmun's concurrence in *Cal-Med* is the controlling holding of the Court. When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal citations omitted).

make political contributions. *See FEC v. NCPAC*, 470 U.S. 480, 498 (1985) ("the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate"). In addition, SpeechNow has not assumed the corporate form and cannot be said to have amassed wealth through that special status. *MCFL*, 479 U.S. at 257.

The reasoned basis of *California Medical Association* was to avoid circumvention of direct limits on contributions to candidates. *See Cal-Med*, 453 U.S. at 203, Blackmun, J., concurring ("contributions to multicandidate political committees may be limited to $5,000 per year as a means of preventing evasion of the limitations on contributions to a candidate or his authorized campaign committee upheld in *Buckley*"). Applying a rule intended to prevent circumvention of direct contributions to a group which does not make direct contributions is precisely the sort of "prophylaxis-upon-prophylaxis" rationale that *WRTL II* held unconstitutional. *WRTL II*, 127 S.Ct. at 2672. While mindful of the judiciary's expertise concerning such matters, the Commission is obligated to avoid the unconstitutional application of the Act.[4] *See* SOR

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[4] The Commission does not undertake constitutional considerations lightly. *See* AO 1998-17 (*Daniels-Cablevision*) (F.E.C. Sept. 10, 1998) (refusing to undertake a constitutional analysis pursuant to clear statutory guidance "clearly drawn

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for MUR 4305, *Forbes for President, et al.* (F.E.C. May 27, 1999) (recognizing the importance of construing the Act to avoid unconstitutional results).

As the Supreme Court indicated in *MCFL*, 479 U.S. at 262, organizations whose independent spending "bec[a]me so extensive that the organization's major purpose may be regarded as campaign activity," political committee registration and regulation would be required. That is the case here. However, nowhere in the holding or dicta of *MCFL* did the Court specifically explain that contribution limits would apply to such organizations.

In short, the contribution limits at hand would place a direct restraint on associational and expressive activity simply because citizens have decided to band together. Individual members of SpeechNow are free to spend as much, and make as many, independent expenditures as they like acting as individual citizens. It is only when they join together that the contribution limits at hand are applicable. Those contribution limits then place restrictions on the ability of citizens to associate and amplify their voices in direct contradiction of the First Amendment. *See Buckley*, 424 U.S. at 22 (recognizing that "amplifying the voice" of association members is "the original

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with the First Amendment in mind"; AO 2003-34 (*Showtime*) (F.E.C. Dec. 19, 2003) (declining to engage in constitutional considerations when a satisfactory statutory basis was available).

basis for the recognition of First Amendment protection of the freedom of association"); *see also NAACP*, 357 U.S. at 460 ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association"). Just as the Commission enjoys no basis upon which to restrain the expression of individuals, it may not do so just because they band together to speak more robustly.

In sum, "limitations on independent expenditures are less directly related to preventing corruption, since '[t]he absence of prearrangement and coordination of an expenditure with the candidate . . . not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.'" *Colorado Repub. Fed. Campaign. Comm. v. FEC*, 518 U.S. 604, 615 (1996). SpeechNow plans to engage in one of the essential features of democracy: "the presentation to the electorate of varying points of view." NCPAC at 488. Placing limits on such speech quells vibrant discussion and does nothing to prevent corruption or its appearance. Thus, lacking a constitutionally permissible reason to apply the contribution limits at hand, the Commission must decline to do so.

Under this analysis, the $5,000 contribution amount limitation in 2 U.S.C. 441a(a)(1)(C) and 11 CFR 110.1(d) would not apply to SpeechNow. Likewise, these donations would not count towards the

individual biennial aggregate contribution limits. *See* 2 U.S.C. 441a(a)(3); 11 CFR 110.5(b)(1).

January 25, 2008

/s/ David M. Mason
David M. Mason
Chairman

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SPEECHNOW.ORG, DAVID KEATING, FRED M. YOUNG, JR., EDWARD H. CRANE, III, BRAD RUSSO, and SCOTT BURKHARDT Plaintiffs v. FEDERAL ELECTION COMMISSION, Defendant.	Civil Case No. 1:08-cv-00248 (JR)

DECLARATION OF DAVID KEATING IN SUPPORT OF PLAINTIFFS' PROPOSED FINDINGS OF FACT

I, DAVID KEATING, declare under penalty of perjury that the following is true:

1. I am a citizen of the United States, a resident of the State of Maryland, am over the age of 18 years, and am eligible to vote in an election for the office of President of the United States. I make this declaration in support of Plaintiffs' proposed findings of fact in support of their motion for certification. This declaration is based on my personal knowledge of the facts stated herein.

2. I am President and Treasurer of SpeechNow.org, an independent speech group of individuals dedicated to promoting and protecting Americans' First Amendment rights to free speech, association, and assembly. SpeechNow.org's mission is to protect First Amendment rights; an essential part of that mission is advocating the election of political candidates who favor free speech and advocating the defeat of candidates who favor speech restrictions. Speech Now.org intends to spend the majority of its funds on that express advocacy. SpeechNow.org seeks to influence the outcome of elections in order to educate the public and politicians and to influence the policy decisions and political futures of those who make the policies that affect First Amendment rights.

3. I organized SpeechNow.org because I believe that the issue of free speech and the threats posed to it by campaign finance laws is vital to the future of this nation. I wanted individuals who share this concern to be able to pool their funds and thus amplify their voices beyond what any individual could achieve on his own. Because federal elections provide a rare opportunity both to impact public policy – by affecting the political futures of the candidates who seek to make public policy – and public debate on issues discussed in campaigns, SpeechNow.org desires to run advertisements calling for the election of candidates who support free speech and association and the defeat of candidates who do not support those rights.

4. I created SpeechNow.org's website (www.speechnow.org), which provides the public with information about the association and its efforts in support of free speech. The website includes a form that allows people to sign up to receive more information about the association and to check a box if they might in the future consider making a donation to Speech Now.org if it is legally able to accept donations. Attached hereto as Exhibit A are true and correct copies of print outs from SpeechNow.org's website.

5. A great number of people have expressed an interest in receiving more information about Speech Now.org's activities and in possibly contributing money to SpeechNow.org in the future. Attached hereto as Exhibit B is a true and correct copy of a printout of all the individuals who have signed up to receive more information on the website. Those who have checked the box indicating that they would consider donating money to SpeechNow.org in the future include a "1" in the right-hand column. The names of all individuals on the list other than the plaintiffs in this case have been redacted.

6. SpeechNow.org is an independent group of citizens whose purpose is communicative. We seek to expressly advocate the election or defeat of candidates, not to make contributions to them. Thus, when I organized SpeechNow.org, I did so with the purpose of avoiding any possibility that SpeechNow.org could pose a threat of corruption or its appearance. Furthermore, SpeechNow.org will abide by all of the disclosure and disclaimer requirements for those who

make independent expenditures, which are described below. Accordingly, I do not believe it is appropriate for SpeechNow.org to be subject to contribution limits or to have to register as a "political committee" as defined by 2 U.S.C. § 431(4).

7. SpeechNow.org is a District of Columbia unincorporated nonprofit association that is registered as a "political organization" under Internal Revenue Code section 527. Attached hereto as Exhibits C, D, E, F, and G are true and correct copies of the following organizational documents: SpeechNow.org's Articles of Organization (Ex. C); a Member Action by Written Consent in Lieu of an Organizational Meeting (Ex. D); a Statement of Appointment of Registered Agent for Service of Process (Ex. E), a Notice of Business Tax Registration (Ex. F), and SpeechNow.org's Internal Revenue Form 8871 (Ex. G). Attached hereto as Exhibit H is a true and correct copy of Speech Now.org's Bylaws (Ex. H) (hereinafter, "*Bylaws*"), which specify the association's mission and the principles under which it will operate. Attached hereto as Exhibit I is an Affirmation by SpeechNow.org's Members that they will abide by the obligations of the Bylaws (Ex. I). I kept all of these documents, as well as the website and the other documents listed in this declaration that reflect SpeechNow.org's activities, in the course of the regularly conducted activity of managing the association's affairs, and it is the regular practice of that activity to prepare those documents.

8. SpeechNow.org was founded by individuals and will operate solely on private donations from

individuals. The association's Bylaws, which I will abide by, prohibit it from directly or indirectly accepting donations or anything of value from business corporations, labor organizations, national banks, federal government contractors, foreign nationals, or political committees. *Bylaws,* Art. VI, § 9; Art X, § 1.

9. SpeechNow.org is independent of any political candidates, committees, and political parties, and its Bylaws require it to operate wholly independently of any of these entities. Under its Bylaws, Speech Now.org cannot make contributions or donations of any kind to any FEC-regulated candidate or political committee, and it cannot "coordinate" its activities, as defined in 2 U.S.C. § 441a(a)(7)(B)(C) and 11 C.F.R. Part 109, with any candidates, national, State, district or local political party committees, or their agents. *Bylaws,* Art. VI, § 10; Art. X, §§ 2-10. Speech Now.org will also not coordinate with political committees.

10. SpeechNow.org's mission and purpose is to protect rights to free speech and association. Its mission and purpose is not to allow individuals to gain access to or obtain gratitude of any candidates or officeholders.

11. SpeechNow.org will solicit donations from individuals for funds to buy public, political advertising, to promote free speech and associational rights, and for administrative purposes. Under its Bylaws, SpeechNow.org's solicitations will inform potential donors that their donations may be used for political

purposes such as supporting or opposing candidates. *Bylaws,* Art. VI, § 11. Some of SpeechNow.org's solicitations will refer to particular candidates for federal office by name.

12. Under its Bylaws, SpeechNow.org cannot engage in business activities including the provision of any goods or services that results in income to SpeechNow.org, or any advertising or promotional activity that results in income to SpeechNow.org, other than in the form of dues or donations. *Bylaws,* Art. VI, § 6. Under its Bylaws, SpeechNow.org cannot offer to any donors or members any benefit that is a disincentive for them to disassociate themselves with SpeechNow.org on the basis of the association's position on a political issue, and it cannot offer its donors or members credit cards, insurance policies or savings plans, training, education, business information, or any other benefits other than that which is necessary to enable recipients to engage in promotion of SpeechNow.org's political ideas. *Bylaws*, Art. VI, § 8.

13. Under its Bylaws, SpeechNow.org must advise its donors that their donations are not tax deductible. *Bylaws,* Art. VI, § 11.

14. As principal founder, President and Treasurer of SpeechNow.org, I administer all of its affairs. As its Treasurer, I understand that I am legally liable for complying with all campaign finance laws to

which SpeechNow.org must comply, including contribution limits and reporting and disclosure obligations.

15. If it is determined that SpeechNow.org is not subject to contribution limits, SpeechNow.org plans to run political advertisements on television during federal elections beginning as soon as possible and practical. If SpeechNow.org were able, it would run ads during the 2008 election cycle, and it would like to run ads in future election cycles.

16. The political advertisements that SpeechNow.org intends to run will expressly advocate the election of candidates for federal office who support rights to free speech and association and the defeat of candidates for federal office who do not support those rights.

17. SpeechNow.org has prepared video and audio scripts for four such advertisements. True and correct copies of these scripts are attached hereto as Exhibit J.

18. Two of the advertisements called for the defeat of Dan Burton, a Republican Congressman currently running for reelection in the fifth district of Indiana. The ads were intended to be run in Mr. Burton's primary. Both ads criticize Representative Burton for voting for H.R. 513, a bill that would restrict the speech of some nonprofit groups. The first of those advertisements urges voters to "Say no to Burton for Congress." The second states that "Dan

Burton voted to restrict our rights. Don't let him do it again." Ex. J.

19. The other two advertisements that Speech Now.org prepared call for the defeat of Mary Landrieu, a Democratic Senator currently running for reelection in Louisiana. Both ads criticize Senator Landrieu for voting for a law restricting the speech of public interest groups and for her general opposition to free speech. The first advertisement urges voters to "Say no to Landrieu for Senate." The second concludes by saying that "Our founding fathers made free speech the First Amendment to the Constitution. Mary Landrieu is taking that right away. Don't let her do it again." Ex. J.

20. SpeechNow.org intended to broadcast the advertisements calling for the defeat of Dan Burton in the fifth district of Indiana and the advertisements calling for the defeat of Mary Landrieu in Louisiana. Due to the campaign finance laws that require SpeechNow.org to register as a political committee and subject it to contribution limits, SpeechNow.org lacks the funds necessary to pay for these ads, and thus will not be able to produce and broadcast them.

21. Attached to this declaration as Exhibit K is a true and correct copy of a bid for the production and airing of the above-described political advertisements. I received this bid from Mr. Ed Traz of the Traz Group. As noted in the bid, the production costs for the advertisements opposing the re-election of Rep. Burton and Sen. Landrieu would be approximately

$12,000. The cost to buy advertising to achieve the total number of gross ratings points described in the bid – for the markets of Indianapolis, New Orleans, and Baton Rouge – is over $150,000. (A gross rating point is a measure of the number of times that an ad is viewed by a target audience.)

22. Over the past eight years, I have worked with organizations that have purchased millions of dollars of advertising, both express advocacy ads and issue ads. Based on my experience, these prices are reasonable. With the donations pledged to Speech Now.org (about $127,000), the association could afford to run significant ads in Indianapolis and either New Orleans or Baton Rouge. The cost of running the ads in Indianapolis and New Orleans would be about $110,500 (plus $12,000 in production costs). The cost of running the ads in Indianapolis and Baton Rouge would be about $110,500 (plus $12,000 in production costs).

23. Based on my previous experience, I believe that an ideal buy in a market would be one that would obtain 1,000 gross rating points or more (meaning that the target audience sees the ad about ten or more times), and that, as a general rule, advertisers in a similar situation are looking for a minimum number of gross ratings points of 500 (meaning that the target audience sees the ad about five or more times). The reason for this is that it is important for people to see an advertisement more than once in order for its message to sink in. Also, in a statewide race – such as Landrieu's Senate race – it

is important to reach as many people in the state as possible.

24. Thus, I strongly preferred to air advertisements in both New Orleans and Baton Rouge and to buy more advertising time than is indicated by the bid. Bringing the Indianapolis, New Orleans, and Baton Rouge buys up to 1,000 gross ratings points would have made the total airtime cost roughly $400,000 – roughly $180,000 for Indianapolis, roughly $150,000 for New Orleans, and roughly $70,000 for Baton Rouge. (These numbers and those that follow would probably have been a bit smaller because the Traz Group would probably reduce its commission with a higher buy.) Bringing the Indianapolis and New Orleans buys up to 500 gross ratings points would have made the total airtime cost roughly $ 219,000 – roughly $90,000 for Indianapolis and roughly $75,000 for New Orleans. (I'm assuming that the Baton Rouge buy would have stayed the same.) Still, I believe that the purchase of advertisements that SpeechNow.org could have afforded with the donations pledged would at least have let SpeechNow.org make an impact; of course, Speech Now.org planned to buy more advertising time – indeed, as much as it could have afforded in order to reach 1,000 gross ratings points in all three markets – if it could have legally obtained the funds to do so. Furthermore, based on my experience, I believe that it is important to be able to spend six figures on purchasing airtime because doing so helps generate additional media interest and free publicity, which

can generate more attention to SpeechNow.org's message nationally and possibly more interest among potential donors.

25. As President of SpeechNow.org, I made and will in the future make the decisions about where and in what races to run SpeechNow.org's advertisements. In doing so, however, I expect to keep the other members of SpeechNow.org apprised of my decisions.

26. In deciding where and in what races SpeechNow.org will run advertisements, I will base my decisions primarily on two factors: (1) the candidates' records or positions on freedom of speech and/or campaign finance laws; and (2) whether the race is close enough that SpeechNow.org's ads might have an impact on the outcome. I made the decisions to run ads against Congressman Burton and Senator Landrieu in this manner, and I will make future decisions about where and in what races to run ads in a similar manner.

27. Thus, I decided to run ads against Congressman Burton because he, along with the majority of House Republicans, voted for H.R. 513, a bill to restrict the speech of some non-profit groups. I felt that Congressman Burton did not support First Amendment rights and was vulnerable to a primary challenge. I spoke to Congressman Burton's primary election opponent, John McGoff, to inquire about his positions on First Amendment issues, and I discovered that he opposed campaign finance laws that infringed on freedom of speech. I spoke to Mr. McGoff

only about his positions on issues. I understand that in order to avoid any questions about coordination and to comply with the FEC's coordination rules, groups like SpeechNow.org that wish to speak independently of candidates cannot speak to candidates, campaigns, or political party committees about their plans, projects, or needs. As a result of my conversation with Mr. McGoff, I concluded that running ads highlighting Congressman Burton's record on campaign finance laws would be a good way to convey to Republicans that they should support freedom of speech and oppose campaign finance laws that would infringe on rights to free speech.

28. I decided that SpeechNow.org should run ads against Mary Landrieu because her election is a high-profile race and she has consistently supported campaign finance legislation that infringed on freedom of speech. I concluded that Senator Landrieu's opponent could not be worse than she on free speech issues and that running advertisements in her race would increase the chances of her defeat and garner attention for SpeechNow.org and its message and mission.

29. If SpeechNow.org had been able to raise the necessary funds, I would have also considered producing and running advertisements in additional races during this election cycle. For instance, I would have considered running ads against any candidate who had voted for the Bipartisan Campaign Reform Act; any candidate who had voted for or sponsored H.R. 513 or S. 271; and any candidate who supported

legislation to create a "Federal Election Administration." More specifically, for the 2008 election cycle, I would have liked SpeechNow.org to have run advertisements opposing Democratic congressional candidate Paul Kanjorski in the 11th district of Pennsylvania.

30. Should SpeechNow.org be freed of the campaign finance restrictions that currently prevent it from operating, it plans and intends to produce and run advertisements calling for the election or defeat of candidates, based on their positions concerning free speech and campaign finance legislation, in future election cycles as well. For instance, in the 2010 election cycle, SpeechNow.org would like to run advertisements opposing North Dakota Senator Byron Dorgan and Colorado Senator Ken Salazar. It would also like to run advertisements against Alaska Senator Lisa Murkowski if she faces a credible primary opponent.

31. Based on my experience and the cost estimates described above, I estimate that SpeechNow.org would need at least $120,000 to be able to run ads in two races in the future. Of course, I would prefer to run as many advertisements as possible in as many races as possible.

32. Should SpeechNow.org be able to raise enough funds, I intend to have the association fund research on candidates' past statements and positions, as well as public opinion polls, to learn what

candidates support or oppose free speech and their ability to compete in their particular races.

33. Pursuant to 2 U.S.C. § 441d(a), all of SpeechNow.org's advertisements and other communications will include its name and address, telephone number or website address, along with a statement indicating that the communication was paid for by SpeechNow.org and was not authorized by any candidate or candidate's committee.

34. Pursuant to 2 U.S.C. § 441d(d)(2), Speech Now.org's advertisements will include a statement indicating that SpeechNow.org is responsible for the content of the advertisement.

35. Pursuant to 2 U.S.C. § 434(c), Speech Now.org will file statements with the FEC reporting the identities of its contributors and the amounts contributed along with the other information required by this provision.

36. SpeechNow.org will not accept any restricted or earmarked contributions that are designated to be spent only on specific elections or for specific purposes. As a result, SpeechNow.org will disclose all of its donors who donate over the contribution disclosure threshold for independent expenditures in its independent expenditure disclosures. It will accomplish this by disclosing in each successive disclosure all of the donors who have contributed money to the association above the threshold since the previous independent expenditure filing was made.

37. In addition, as an association organized under section 527 of the Internal Revenue Code, SpeechNow.org must make regular disclosures of all receipts and disbursements. Attached hereto as Exhibit L is a true and correct copy of SpeechNow.org's latest disclosure statement to the IRS.

38. I organized SpeechNow.org to avoid any concerns about corruption or its appearance. Thus, I restricted its funding to individual donations and drafted its bylaws to ensure its independence from candidates, political party committees, and political committees. However, I recognized when I created SpeechNow.org that we would have to seek the FEC's approval before we could commence operations. I also understood that, should such approval not be forthcoming, SpeechNow.org and its members would have to go to court to secure our constitutional rights. My ultimate goal, however, was to create a group that could expressly advocate for candidates who supported free speech rights and against those who did not and that could serve as a model for other groups that wanted to engage in express advocacy from any ideological perspective without running afoul of the campaign finance laws.

39. I am ready, willing, and able to donate immediately $5,500 in order to fund the advertisements that SpeechNow.org wants to run calling for the defeat of candidates to federal office. Edward Crane is ready, willing, and able to donate immediately $6,000; Richard Marder is ready, willing, and able to donate immediately $5,500; and Fred M.

Young, Jr. is ready, willing, and able to donate immediately $110,000. But SpeechNow.org is prohibited from accepting these donations or soliciting additional donations over $5,000 because they would exceed the limit described in 2 U.S.C. § 441a(a)(1)(C). Furthermore, Fred Young's donation would also exceed the limit set forth in 2 U.S.C. § 441a(a)(3). I also understand that SpeechNow.org faces, and I, as its treasurer, face, a credible threat of prosecution if the association accepts donations in excess of the limits contained in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3) to fund its advertisements as described herein. Accordingly, SpeechNow.org cannot raise the funds necessary to produce and broadcast the advertisements it wanted to run against Congressman Burton or the advertisements it wants to run against Senator Landrieu and other candidates in this and future election seasons.

40. SpeechNow.org will immediately accept the donations from me, Edward Crane, Richard Marder, Fred Young and will run advertisements that call for the election of candidates who support free speech rights and the defeat of candidates who oppose them if it is legally able to do so without violating the contribution limits described above. Without those contributions, SpeechNow.org cannot afford to run the proposed advertisements or other, similar, advertisements in the future.

41. Furthermore, because of the contribution limits contained in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3), SpeechNow.org cannot raise the initial

start-up or "seed" funding necessary to finance its operations. I have been involved in or aware of the running of and raising money for nonprofits for 30 years. Based on my experience, I believe that it is crucial for new organizations to have seed-money that allows them to begin to advance their mission before a successful program of larger-scale fundraising can take place. This is particularly true when an organization is working on an issue for which there is not yet an overwhelming and sustained amount of outrage (usually generated by a string of high-profile events) throughout all quarters of the public and the media that generates a strong demand for the change favored by the organization. Right now, the issue of restrictions on free speech by campaign finance laws is not such an issue. SpeechNow.org will need to spend substantial funds on advertisements in order to raise the profile of this issue and thus add more donors, both large and small, to the cause. However, without initial seed funding, SpeechNow.org lacks the funds necessary to convince donors that it is a going concern that has already produced advertisements consistent with its mission; I believe convincing donors of this is a prerequisite to a successful larger-scale fundraising effort. In order to do that, I believe that SpeechNow.org will, at a minimum, need to run advertisements in two races – but preferably more.

42. Another prerequisite to a successful larger-scale fundraising effort is SpeechNow.org's ability to hire a full-time employee who can devote most or all of her time to the association's mission, including its

fundraising efforts. I am a one-man volunteer staff right now, and the only time I can conceivably devote to personal fundraising is during the evenings, lunch breaks, or personal or vacation time, when I'm not working in my role as executive director of the Club for Growth. Of course, reaching potential donors in the limited hours available during those times is quite difficult, and often impossible.

43. The longer SpeechNow.org has to go without seed funding, the more it will be delayed in producing and running its political advertisements and then in undertaking larger-scale fundraising based on a reputation for taking actions that advance its mission in the real world. Indeed, every day that goes by under the current restrictions under federal election law is one less day that SpeechNow.org has to raise the issue of free speech.

44. Even assuming that SpeechNow.org could somehow raise enough money in increments of $5,000 or less per donor to pay for its advertisements, the contribution limits applicable to political committees would, by making it harder to gather funds, still greatly limit the number of times it could run those ads. The limits would also restrict SpeechNow.org's ability to run additional advertisements concerning other federal candidates in other races.

45. In addition to the contribution limits described above, having to register as a political committee presents its own set of problems. Another reason that SpeechNow.org has not produced and run

the above-described political advertisements is that, under the definition of political committee contained in 2 U.S.C. § 431(4) and according to what I believe is the FEC's position, spending or receiving more than $1,000 to pay for the advertisements would make SpeechNow.org a political committee subject to organizational, administrative, and reporting obligations under FECA (described in the following paragraph). For the same reason, SpeechNow.org has not accepted any donations, other than the $207 in in-kind donations I made through October 15, 2008, whether above or below the contribution limits for political committees, or solicited any donations or accepted any other funds for its operation. Doing so over the $1,000 threshold would cause SpeechNow.org to have to register as a political committee. I understand that SpeechNow.org faces and that I, as treasurer, face, a real threat of prosecution if SpeechNow.org accepts donations in excess of $1,000 without registering as a political committee and complying with the organizational, administrative, and reporting obligations described in the next paragraph.

46. My understanding is that having to register as a political committee would, among other things, require SpeechNow.org to file a statement of organization, appoint a treasurer for federal election law purposes, maintain a record of all contributions and expenditures for three years, and file regular reports disclosing detailed information concerning the amounts of all contributions and expenditures, the identities of contributors, persons who make loans or give rebates

or refunds to the committee, persons who provide any dividend or interest to the committee, the identities of those to whom expenditures are made, and the committee's operating expenses, among other information.

47. I am familiar with these obligations and have some experience trying to comply with them, and I believe compliance with them is burdensome. That is especially true for SpeechNow.org, given that I run the association alone, primarily from my home, and that SpeechNow.org has no employees. It is particularly burdensome to shoulder these obligations before SpeechNow.org can spend money on political advertisements or other activities that advance its mission. In such a situation, I would be spending too much of my time with the association complying with the above-mentioned obligations and could not spend this time advancing SpeechNow.org's mission.

48. I also have some experience complying with the disclosure requirements for independent expenditures. These are less burdensome to comply with than the requirements for political committees.

49. Beyond the burdensome organizational and administrative requirements that political committees face, SpeechNow.org does not want to be identified as a PAC because the term would imply that the association gives to and works with candidates, political parties, or both. I believe that many people, including those in the media, donors, and voters, have a negative view of PACs because of the reputation of

PACs as colluding with elected officials, political parties, and candidates. I also do not want SpeechNow.org to have to register as a political committee or have to refer to it as a political committee, because I believe that will make it more difficult to raise funds for SpeechNow.org. There are a number of reasons for that. For example, there are complex contribution limits that affect political committees and parties. There has been an annual calendar-year contribution limit of $5,000 to political committees for over thirty years, and therefore I believe many donors would be reluctant to contribute more than that amount even if a Court ruled additional donations to PACs that are structured like SpeechNow.org are legal. Finally, many people are aware of the biennial contribution limits applicable to all PAC contributions, and would thus be reluctant to give SpeechNow.org an amount over this biennial limit or believe they may be forced to choose between giving to SpeechNow.org or other political committees.

50. Because of the current state of the law, I have decided that SpeechNow.org cannot even accept donations under $1,000, even though I have been contacted, through the SpeechNow.org website and other means, by potential donors who want to make such donations. One such person is plaintiff Scott Burkhardt, who contacted me last year and asked how he can contribute to SpeechNow.org. Unfortunately, I had to decline his proffered contribution. (Indeed, about 180 people have signed up on the SpeechNow.org website to indicate their support for

our policies and to receive updates about the association.) Both Mr. Burkhardt and Brad Russo are two donors who are ready, willing, and able to give SpeechNow.org $100 each. Donations like those, however, would inch SpeechNow.org closer to being a "political committee," and they would not give it nearly enough money to produce and run advertisements, which, as noted above, are a necessary precondition to a successful large-scale fundraising effort. Until SpeechNow.org is allowed to accept the contributions of over $5,000 that are already pledged, it cannot accept any donations. Accepting even small donations could expose SpeechNow.org to all of the burdensome requirements discussed above without providing the association enough money to speak out through advertisements in support of its mission and become a going concern that can undertake broader fundraising efforts.

51. If it is determined that SpeechNow.org is not subject to contribution limits, it will immediately accept, in addition to the donations from me, Ed Crane, Fred Young, and Richard Marder, the donations of Brad Russo and Scott Burkhardt. Furthermore, following that determination, which will allow SpeechNow.org to produce and run advertisements, SpeechNow.org will solicit large and small donations (including from individuals who have signed up on SpeechNow.org's website or who have otherwise contacted me about SpeechNow.org).

52. If it is determined that SpeechNow.org is not subject to contribution limits, I will immediately

donate $5,500 to SpeechNow.org. I would also like to be able to donate additional funds this year and in the future to finance SpeechNow.org's advertisements, and I will make those donations if it is determined that SpeechNow.org is not subject to contribution limits of any kind. I obviously support and agree with SpeechNow.org's mission and message, and I believe that joining with other like-minded individuals who wish to support and operate SpeechNow.org will allow me to more effectively communicate my views on free speech and candidates' positions on free speech than if I were to attempt to speak alone. In other words, giving money to SpeechNow.org allows me to amplify my speech about my views and to reach a much broader audience than I could by myself. I wish to donate money to SpeechNow.org to support its speech-related mission, not to obtain access to or gratitude of candidates or officeholders, and I would prefer that any candidates or officeholders not know that I contribute to SpeechNow.org, although I am willing to donate knowing that the public would have access to this information. Despite my desire to give money, I will not be able to donate $5,500 to SpeechNow.org if it is subject to the contribution limits imposed on PACs. I also understand that I face a real threat of prosecution if I give over $5,000 to SpeechNow.org. I am also not willing to spend $5,500 on my own as an individual because I believe this amount, if spent on advertising, would have no measurable effect to promote the cause of free speech.

53. So that individuals may donate money to SpeechNow.org in the event that the association is legally able to accept donations, I have set up a PayPal account. Attached hereto is Exhibit M, which is a true and correct copy of an email from PayPal.com confirming the establishment of the account. I have also signed up SpeechNow.org with an email marketing service so that it may communicate with its members, supporters, and others. Attached hereto is Exhibit N, which is a true and correct copy of an email from iContact.com confirming the establishment of the account. Attached hereto as Exhibit O are two articles I have sent to the individuals on the iContact list and two emails confirming that information was sent to those individuals.

54. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 27th day of October, 2008.

/s/ David Keating
David Keating

APPEAL, CLOSED, TYPE-L

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:08-cv-00248-JDB

SPEECHNOW.ORG et al v. FEDERAL ELECTION COMMISSION
Assigned to: Judge John D. Bates
Case in other court: USCA, 08-05223
Cause: 02:437 Federal Election Commission

Date Filed: 02/14/2008
Date Terminated: 05/27/2010
Jury Demand: None
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: U.S. Government Defendant

Plaintiff

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Date Filed	#	Docket Text
02/14/2008	1	COMPLAINT against FEDERAL ELECTION COMMISSION (Filing fee $ 350, receipt number 4616010261) filed by SPEECHNOW.ORG, DAVID KEATING, FRED M. YOUNG, JR, EDWARD H. CRANE, III, BRAD RUSSO, SCOTT BURKHARDT. (Attachments: # 1 Civil Cover Sheet)(lc,) (Entered: 02/21/2008)
02/14/2008	2	MOTION for Preliminary Injunction by SPEECHNOW.ORG, DAVID

		KEATING, FRED M. YOUNG, JR, EDWARD H. CRANE, III, BRAD RUSSO, SCOTT BURKHARDT (Attachments: # 1 Text of Proposed Order, # 2 Russo Declaration, # 3 Keating Declaration, # 4 Crane Declaration, # 5 Traz Declaration, # 6 Young Declaration, # 7 Burkhardt Declaration, # 8 Simpson Declaration, # 9 Exhibit 6)(lc,) (Entered: 02/21/2008)
02/14/2008		Summons (1) Issued as to FEDERAL ELECTION COMMISSION. (lc,) (Entered: 02/21/2008)
02/20/2008	3	Unopposed MOTION for Extension of Time to *Respond to Plaintiffs' Motion for Preliminary Injunction* by FEDERAL ELECTION COMMISSION (Attachments: # 1 Text of Proposed Order)(Bonham, Robert) Modified on 2/22/2008 (nmw,). (Entered: 02/21/2008)
02/20/2008	4	NOTICE of Appearance by Robert William Bonham, III on behalf of FEDERAL ELECTION COMMISSION (Bonham, Robert) Modified on 2/22/2008 (nmw,). (Entered: 02/21/2008)
02/20/2008	5	NOTICE of Appearance by David Brett Kolker on behalf of FEDERAL ELECTION COMMISSION (Kolker, David) Modified on 2/22/2008 (nmw,). (Entered: 02/21/2008)

02/25/2008	6	ORDER granting 3 Motion for Extension of Time to file response to motion for preliminary injunction. Signed by Judge Richard J. Leon on 2/22/3008. (alr,) (Entered: 02/26/2008)
02/29/2008	7	NOTICE of Appearance by Steve Nicholas Hajjar on behalf of FEDERAL ELECTION COMMISSION (Hajjar, Steve) (Entered: 02/29/2008)
03/03/2008	8	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Bradley A. Smith, :Firm- Center for Competitive Politics, :Address- 124 S. West Street, Suite 201, Alexandria, VA 22314. Phone No. – 703-894-6800. Fax No. – 703-682-9321 by SPEECHNOW.ORG, DAVID KEATING, FRED M. YOUNG, JR, EDWARD H. CRANE, III, BRAD RUSSO, SCOTT BURKHARDT (Attachments: # 1 Affidavit of Bradley A. Smith in Support of Motion for Pro Hac Vice, # 2 Text of Proposed Order) (Simpson, Steven) (Entered: 03/03/2008)
03/03/2008	9	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Michael P. Darner, :Firm- Center for Competitive Politics, :Address- 124 S. West Street, Suite 201, Alexandria, VA 22314. Phone No. –

703-894-6800. Fax No. – 703-682-9321 by SPEECHNOW.ORG, DAVID KEATING, FRED M. YOUNG, JR, EDWARD H. CRANE, III, BRAD RUSSO, SCOTT BURKHARDT (Attachments: # 1 Affidavit of Michael P. Darner in Support of Motion for Pro Hac Vice, # 2 Text of Proposed Order)(Simpson, Steven) (Entered: 03/03/2008)

03/05/2008 10 MOTION for Leave to File Memorandum as Amici Curiae by DEMOCRACY 21, CAMPAIGN LEGAL CENTER (Attachments: # 1 Exhibit Memorandum in Opposition to Motion for Preliminary Injunction, # 2 Text of Proposed Order)(nmw,) (Entered: 03/05/2008)

03/05/2008 11 NOTICE of Appearance by Kevin Deeley on behalf of FEDERAL ELECTION COMMISSION (Deeley, Kevin) (Entered: 03/05/2008)

03/05/2008 12 Memorandum in opposition to re 10 MOTION for Leave to File *Memorandum as Amici Curiae* filed by SPEECHNOW.ORG, DAVID KEATING, FRED M. YOUNG, JR, EDWARD H. CRANE, III, BRAD RUSSO, SCOTT BURKHARDT. (Attachments: # 1 Text of Proposed Order)(Simpson, Steven) (Entered: 03/05/2008)

03/05/2008	13	Memorandum in opposition to re 2 MOTION for Preliminary Injunction filed by FEDERAL ELECTION COMMISSION. (Attachments: # 1 Declaration Sadio, # 2 Text of Proposed Order)(Hajjar, Steve) (Entered: 03/05/2008)
03/06/2008	14	ORDER granting Democracy 21 and Campaign Legal Center's motion for leave to file as amici curiae 10 . Signed by Judge James Robertson on March 6, 2008. (MT) (Entered: 03/06/2008)
03/06/2008	15	Memorandum in opposition to re 2 MOTION for Preliminary Injunction filed by DEMOCRACY 21, CAMPAIGN LEGAL CENTER. (nmw,) (Entered: 03/07/2008)
03/07/2008	16	ORDER granting only upon condition plaintiffs' motions for pro hac appearances of Bradley A. Smith 8 and Michael P. Darner 9 . Signed by Judge James Robertson on March 7, 2008. (MT) (Entered: 03/07/2008)
03/10/2008	17	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed as to FEDERAL ELECTION COMMISSION served on 2/14/2008, answer due 4/14/2008. (Attachments: # 1 Affidavit of Service on FEC)(Simpson, Steven) (Entered: 03/10/2008)

03/11/2008	18	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Stephen M. Hoersting, :Firm- Center for Competitive Politics, :Address- 124 S. West Street, Suite 201, Alexandria, VA 22314. Phone No. – (703) 894-6800. Fax No. – (703) 894-6811 by SPEECHNOW. ORG, DAVID KEATING, FRED M. YOUNG, JR, EDWARD H. CRANE, III, BRAD RUSSO, SCOTT BURKHARDT (Attachments: # 1 Affidavit of Stephen M. Hoersting in Support of Motion for Pro Hac Vice, # 2 Text of Proposed Order)(Simpson, Steven) (Entered: 03/11/2008)
03/12/2008	19	ORDER granting only upon condition plaintiffs' motion for pro hac vice appearance of Stephen M. Hoersting 18 . Signed by Judge James Robertson on March 12, 2008. (MT) (Entered: 03/12/2008)
03/12/2008	20	REPLY to opposition to motion re 2 MOTION for Preliminary Injunction filed by SPEECHNOW. ORG, DAVID KEATING, FRED M. YOUNG, JR, EDWARD H. CRANE, III, BRAD RUSSO, SCOTT BURKHARDT. (Simpson, Steven) (Entered: 03/12/2008)
03/18/2008	21	NOTICE *of Objection* by FEDERAL ELECTION COMMISSION re 20

		Reply to opposition to Motion (Hajjar, Steve) (Entered: 03/18/2008)
03/18/2008	22	RESPONSE re 21 Notice of Objections re 20 Reply to opposition to Motion *Response to Fec's Objection to Reply Brief or, in the alternative, Motion for Leave to File Reply Brief* filed by SPEECHNOW.ORG, DAVID KEATING, FRED M. YOUNG, JR, EDWARD H. CRANE, III, BRAD RUSSO, SCOTT BURKHARDT. (Attachments: # 1 Text of Proposed Order)(Simpson, Steven) Modified links on 3/19/2008 (nmw,). (Entered: 03/18/2008)
03/20/2008		Set Hearing: Motion Hearing re: preliminary injunction set for 4/11/2008 09:30 AM in Courtroom 23A before Judge James Robertson. (alr,) (Entered: 03/20/2008)
03/20/2008	23	ORDER that the FEC's objection to the filing of a reply brief 21 is overruled, with commentary. Signed by Judge James Robertson on March 20, 2008. (MT) (Entered: 03/20/2008)
04/11/2008		Minute Entry for proceedings held before Judge James Robertson: Motion Hearing held on 4/11/2008 re 2 MOTION for Preliminary Injunction filed by FRED M. YOUNG, JR., DAVID KEATING, EDWARD H. CRANE, III, SPEECHNOW.ORG,

SCOTT BURKHARDT, BRAD RUSSO. Motion taken under advisement. (Court Reporter Rebecca Stonestreet.) (alr,) (Entered: 04/14/2008)

04/14/2008 24 ANSWER to 1 Complaint, by FEDERAL ELECTION COMMISSION. Related document: 1 Complaint, filed by FRED M. YOUNG, JR., DAVID KEATING, EDWARD H. CRANE, III, SPEECHNOW.ORG, SCOTT BURKHARDT, BRAD RUSSO.(Bonham, Robert) (Entered: 04/14/2008)

05/02/2008 25 NOTICE OF SUPPLEMENTAL AUTHORITY by SPEECHNOW.ORG, DAVID KEATING, FRED M. YOUNG, JR, EDWARD H. CRANE, III, BRAD RUSSO, SCOTT BURKHARDT (Simpson, Steven) (Entered: 05/02/2008)

05/02/2008 26 NOTICE OF WITHDRAWAL OF APPEARANCE as to SPEECHNOW.ORG, DAVID KEATING, FRED M. YOUNG, JR, EDWARD H. CRANE, III, BRAD RUSSO, SCOTT BURKHARDT. Attorney Michael P. Darner terminated. (Darner, Michael) (Entered: 05/02/2008)

06/06/2008 27 MEET AND CONFER STATEMENT. (Attachments: # 1 Text of Proposed Order)(Simpson, Steven) (Entered: 06/06/2008)

06/20/2008	28	MOTION for Leave to File *First Amended Complaint* by SPEECHNOW.ORG, DAVID KEATING, FRED M. YOUNG, JR, EDWARD H. CRANE, III, BRAD RUSSO, SCOTT BURKHARDT (Attachments: # 1 First Amended Complaint, # 2 Text of Proposed Order)(Simpson, Steven) (Entered: 06/20/2008)
06/27/2008	29	Memorandum in opposition to re 28 MOTION for Leave to File *First Amended Complaint [Consenting to Motion]* filed by FEDERAL ELECTION COMMISSION. (Hajjar, Steve) (Entered: 06/27/2008)
06/27/2008	30	NOTICE OF SUPPLEMENTAL AUTHORITY by SPEECHNOW.ORG, DAVID KEATING, FRED M. YOUNG, JR, EDWARD H. CRANE, III, BRAD RUSSO, SCOTT BURKHARDT (Simpson, Steven) (Entered: 06/27/2008)
06/27/2008	31	MOTION for Order *to Certify Under 2 U.S.C 437h* by SPEECHNOW.ORG, DAVID KEATING, FRED M. YOUNG, JR, EDWARD H. CRANE, III, BRAD RUSSO, SCOTT BURKHARDT (Attachments: # 1 Text of Proposed Order)(Simpson, Steven) (Entered: 06/27/2008)
07/01/2008	32	ORDER denying plaintiffs' motion for preliminary injunction 2 and

		denying plaintiffs' certification motion 31 . Signed by Judge James Robertson on July 1, 2008. (MT) (Entered: 07/01/2008)
07/02/2008		MINUTE ORDER granting plaintiffs' motion for leave to file first amended complaint 28 . Signed by Judge James Robertson on July 2, 2008. (MT) (Entered: 07/02/2008)
07/02/2008	33	FIRST AMENDED COMPLAINT against FEDERAL ELECTION COMMISSION filed by SPEECH NOW.ORG, DAVID KEATING, FRED M. YOUNG, JR, EDWARD H. CRANE, III, BRAD RUSSO, SCOTT BURKHARDT.(nmw,) (Entered: 07/03/2008)
07/09/2008	34	MOTION for Reconsideration re 32 Order on Motion for Order, Order on Motion for Preliminary Injunction by SPEECHNOW.ORG, DAVID KEATING, FRED M. YOUNG, JR, EDWARD H. CRANE, III, BRAD RUSSO, SCOTT BURKHARDT (Attachments: # 1 Memorandum in Support of Motion to Reconsider, # 2 Text of Proposed Order)(Simpson, Steven) (Entered: 07/09/2008)
07/11/2008	35	ORDER granting the motion for reconsideration 34 . That portion of this Court's order of 7/1/08 which denied the certification motion is vacated. Signed by Judge James

		Robertson on July 11, 2008. (MT) (Entered: 07/11/2008)
07/17/2008	36	ANSWER to 33 Amended Complaint by FEDERAL ELECTION COMMISSION. Related document: 33 Amended Complaint filed by FRED M. YOUNG, JR., DAVID KEATING, EDWARD H. CRANE, III, SPEECHNOW.ORG, SCOTT BURKHARDT, BRAD RUSSO. (Bonham, Robert) (Entered: 07/17/2008)
07/18/2008	37	Memorandum in opposition to re 31 MOTION for Order *to Certify Under 2 U.S.C. 437h* filed by FEDERAL ELECTION COMMISSION. (Bonham, Robert) (Entered: 07/18/2008)
07/23/2008	38	NOTICE OF APPEAL as to 32 Order on Motion for Order, Order on Motion for Preliminary Injunction by SPEECHNOW.ORG, DAVID KEATING, FRED M. YOUNG, JR, EDWARD H. CRANE, III, BRAD RUSSO, SCOTT BURKHARDT. Filing fee $ 455, receipt number 4616013878. Fee Status: Fee Paid. Parties have been notified. (tg,) (Entered: 07/24/2008)
07/24/2008		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 38 Notice of Appeal, (tg,) (Entered: 07/24/2008)

07/25/2008	39	REPLY to opposition to motion re 31 MOTION for Order *to Certify Under 2 U.S.C 437h* filed by SPEECHNOW.ORG, DAVID KEATING, FRED M. YOUNG, JR, EDWARD H. CRANE, III, BRAD RUSSO, SCOTT BURKHARDT. (Simpson, Steven) (Entered: 07/25/2008)
07/29/2008	40	ORDER re motion for order to certify under 2 U.S.C. 437h 31 . Signed by Judge James Robertson on July 29, 2008. (MT) (Entered: 07/29/2008)
07/29/2008		USCA Case Number 08-5223 for 38 Notice of Appeal, filed by FRED M. YOUNG, JR., DAVID KEATING, EDWARD H. CRANE, III, SPEECHNOW.ORG, SCOTT BURKHARDT, BRAD RUSSO. (tg,) (Entered: 07/30/2008)
08/04/2008	41	TRANSCRIPT OF PROCEEDINGS before Judge James Robertson of proceedings held on April 11, 2008; Page Numbers: 1-48. Date of Issuance:August 4, 2008. Court Reporter/Transcriber Rebecca Stonestreet, Telephone number 202-354-3249, Court Reporter Email Address : kingreporter2@verizon.net. For the first 90 days after this filing date, the transcript may be viewed

at the courthouse at a public terminal or purchased from the court reporter referenced above. After 90 days, the transcript may be accessed via PACER. Other transcript formats, (multi-page, condensed, CD or ASCII) may be purchased from the court reporter.

NOTICE RE REDACTION OF TRANSCRIPTS: The parties have twenty-one days to file with the court and the court reporter any request to redact personal identifiers from this transcript. If no such requests are filed, the transcript will be made available to the public via PACER without redaction after 90 days. The policy, which includes the five personal identifiers specifically covered, is located on our website at ww.dcd.uscourts.gov.

Redaction Request due 8/25/2008. Redacted Transcript Deadline set for 9/4/2008. Release of Transcript Restriction set for 11/3/2008. (Stonestreet, Rebecca) (Entered: 08/04/2008)

09/26/2008 42 NOTICE Amendment to Joint Scheduling Report by SPEECH NOW.ORG, DAVID KEATING, FRED M. YOUNG, JR, EDWARD H. CRANE, III, BRAD RUSSO, SCOTT BURKHARDT, FEDERAL

		ELECTION COMMISSION re 27 Meet and Confer Statement (Bonham, Robert) (Entered: 09/26/2008)
10/02/2008		MINUTE ORDER approving and so ordering amended scheduling report 42 . Signed by Judge James Robertson on October 2, 2008. (MT) (Entered: 10/02/2008)
10/15/2008	43	MOTION to Amend/Correct 27 Meet and Confer Statement/*Case Schedule* by SPEECHNOW.ORG, DAVID KEATING, FRED M. YOUNG, JR, EDWARD H. CRANE, III, BRAD RUSSO (Attachments: # 1 Text of Proposed Order) (Simpson, Steven) (Entered: 10/15/2008)
10/17/2008		MINUTE ORDER granting and so ordering motion to extend briefing schedule 43 . Signed by Judge James Robertson on October 17, 2008. (MT) (Entered: 10/17/2008)
10/28/2008	44	Proposed Findings of Fact by SPEECHNOW.ORG, DAVID KEATING, FRED M. YOUNG, JR, EDWARD H. CRANE, III, BRAD RUSSO, SCOTT BURKHARDT. (Attachments: # 1 Declaration of Steven M. Simpson, # 2 Exhibit Simpson 1, # 3 Exhibit Simpson 2, # 4 Exhibit Simpson 3A, # 5 Exhibit Simpson 3B, # 6 Exhibit Simpson 3C, # 7 Exhibit Simpson 4, # 8

Exhibit Simpson 5, # 9 Exhibit Simpson 6, # 10 Exhibit Simpson 7, # 11 Exhibit Simpson 8, # 12 Exhibit Simpson 9, # 13 Exhibit Simpson 10, # 14 Exhibit Simpson 11, # 15 Exhibit Simpson 12, # 16 Exhibit Simpson 13, # 17 Exhibit Simpson 14, # 18 Exhibit Simpson 15, # 19 Exhibit Simpson 16, # 20 Exhibit Simpson 17, # 21 Exhibit Simpson 18, # 22 Exhibit Simpson 19, # 23 Exhibit Simpson 20, # 24 Exhibit Simpson 21, # 25 Exhibit Simpson 22, # 26 Exhibit Simpson 23, # 27 Exhibit Simpson 24, # 28 Exhibit Simpson 25, # 29 Exhibit Simpson 26, # 30 Exhibit Simpson 27, # 31 Exhibit Simpson 28, # 32 Exhibit Simpson 29, # 33 Exhibit Simpson 30, # 34 Exhibit Simpson 31, # 35 Exhibit Simpson 32, # 36 Exhibit Simpson 33, # 37 Exhibit Simpson 34, # 38 Declaration of David Keating, # 39 Exhibit Keating A, # 40 Exhibit Keating B, # 41 Exhibit Keating C, # 42 Exhibit Keating D, # 43 Exhibit Keating E, # 44 Exhibit Keating F, # 45 Exhibit Keating G, # 46 Exhibit Keating H, # 47 Exhibit Keating I, # 48 Exhibit Keating J, # 49 Exhibit Keating K, # 50 Exhibit Keating L, # 51 Exhibit Keating M, # 52 Exhibit Keating N, # 53 Exhibit Keating O, # 54

		Declaration of Jeffrey Milyo, # 55 Declaration of Rodney Smith, # 56 Declaration of Fred Young, # 57 Declaration of Edward Crane, # 58 Declaration of Brad Russo, # 59 Declaration of Scott Burkhardt) (Simpson, Steven) (Entered: 10/28/2008)
10/28/2008	45	Proposed Findings of Fact by FEDERAL ELECTION COMMISSION. (Attachments: # 1 Exhibit 1-19, # 2 Exhibit 20-29, # 3 Exhibit 30-38, # 4 Exhibit 39, # 5 Exhibit 40-50, # 6 Exhibit 51-60, # 7 Exhibit 61-100, # 8 Exhibit 101-105, # 9 Exhibit 106-120, # 10 Exhibit 121-130, # 11 Exhibit 131-142, # 12 Exhibit 143-145)(Hajjar, Steve) (Entered: 10/28/2008)
10/31/2008	46	MOTION for Protective Order by FEDERAL ELECTION COMMISSION (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Declaration of Graham M. Wilson)(Bonham, Robert) (Entered: 10/31/2008)
11/05/2008	47	NOTICE of Appearance by Graham Mead Wilson on behalf of FEDERAL ELECTION COMMISSION (Wilson, Graham) (Entered: 11/05/2008)
11/11/2008	48	ENTERED IN ERROR.....NOTICE of Appearance by Steven Simpson

		on behalf of all plaintiffs (Simpson, Steven) Modified on 11/12/2008 (tg,). (Entered: 11/11/2008)
11/11/2008	49	Memorandum in opposition to re 46 MOTION for Protective Order filed by SPEECHNOW.ORG, DAVID KEATING, FRED M. YOUNG, JR, EDWARD H. CRANE, III, BRAD RUSSO, SCOTT BURKHARDT. (Attachments: # 1 Declaration of Steven Simpson, # 2 Exhibit Simpson 1, # 3 Exhibit Simpson 2, # 4 Exhibit Simpson 3, # 5 Exhibit Simpson 4, # 6 Exhibit Simpson 5, # 7 Exhibit Simpson 6, # 8 Exhibit Simpson 7, # 9 Exhibit Simpson 8, # 10 Exhibit Simpson 9, # 11 Exhibit Simpson 10, # 12 Exhibit Simpson 11, # 13 Text of Proposed Order)(Simpson, Steven) (Entered: 11/11/2008)
11/12/2008		NOTICE OF CORRECTED DOCKET ENTRY: re 48 Notice of Appearance was entered in error. Attorney filer, Robert Frommer, is not a member of the U.S. District Court for the District of Columbia.(tg,) (Entered: 11/12/2008)
11/21/2008	50	REPLY to opposition to motion re 46 MOTION for Protective Order filed by FEDERAL ELECTION COMMISSION. (Attachments: # 1 Declaration Wilson Declaration, # 2 Exhibit Wilson Declaration

Exhibit 1, # 3 Exhibit Wilson Declaration Exhibit 2, # 4 Exhibit Wilson Declaration Exhibit 3, # 5 Exhibit Wilson Declaration Exhibit 4, # 6 Exhibit Wilson Declaration Exhibit 5, # 7 Exhibit Wilson Declaration Exhibit 6, # 8 Exhibit Wilson Declaration Exhibit 7, # 9 Exhibit Wilson Declaration Exhibit 8, # 10 Text of Proposed Order Attachment A – Perenchio Protective Order)(Wilson, Graham) (Entered: 11/21/2008)

11/21/2008 51 First MOTION in Limine by SPEECHNOW.ORG, DAVID KEATING, FRED M. YOUNG, JR, EDWARD H. CRANE, III, BRAD RUSSO, SCOTT BURKHARDT (Attachments: # 1 Declaration of Robert Gall in Support of First Motion in Limine, # 2 Exhibit A of Gall Declaration, # 3 Exhibit B of Gall Declaration, # 4 Exhibit C of Gall Declaration, # 5 Errata D of Gall Declaration, # 6 Exhibit E of Gall Declaration, # 7 Exhibit F of Gall Declaration, # 8 Exhibit G of Gall Declaration, # 9 Exhibit H of Gall Declaration, # 10 Exhibit I of Gall Declaration, # 11 Exhibit J of Gall Declaration, # 12 Exhibit K of Gall Declaration, # 13 Exhibit L of Gall Declaration, # 14 Exhibit M of Gall Declaration, # 15 Exhibit N of Gall Declaration, # 16 Exhibit O of

Gall Declaration, # 17 Exhibit P of Gall Declaration, # 18 Exhibit Q of Gall Declaration, # 19 Exhibit R of Gall Declaration, # 20 Exhibit S of Gall Declaration, # 21 Errata T of Gall Declaration, # 22 Exhibit U of Gall Declaration, # 23 Exhibit V of Gall Declaration, # 24 Exhibit W of Gall Declaration, # 25 Exhibit X of Gall Declaration, # 26 Exhibit Y of Gall Declaration, # 27 Exhibit Z of Gall Declaration, # 28 Exhibit AA of Gall Declaration, # 29 Exhibit BB of Gall Declaration, # 30 Exhibit CC of Gall Declaration, # 31 Exhibit DD of Gall Declaration, # 32, Exhibit EE of Gall Declaration, # 33 Exhibit FF of Gall Declaration, # 34 Exhibit GG of Gall Declaration, # 35 Declaration of Robert Frommer in Support of First Motion in Limine, # 36 Text of Proposed Order for First Motion in Limine)(Simpson, Steven) (Entered: 11/21/2008)

11/21/2008 52 Second MOTION in Limine by SPEECHNOW.ORG, DAVID KEATING, FRED M. YOUNG, JR, EDWARD H. CRANE, III, BRAD RUSSO, SCOTT BURKHARDT (Attachments: # 1 Declaration of Robert Gall in Support of Second Motion in Limine, # 2 Exhibit A of Second Gall Declaration, # 3 Exhibit B of Second Gall Declaration, # 4 Exhibit C of Second Gall

Declaration, # 5 Exhibit D of Second Gall Declaration, # 6 Exhibit E of Second Gall Declaration, # 7 Errata F of Second Gall Declaration, # 8 Exhibit G of Second Gall Declaration, # 9 Exhibit H of Second Gall Declaration, # 10 Exhibit I of Second Gall Declaration, # 11 Declaration of Jeffrey Milyo in Support of Second Motion in Limine, # 12 Text of Proposed Order for Second Motion in Limine) (Simpson, Steven) (Entered: 11/21/2008)

11/21/2008 53 RESPONSE re 45 Proposed Findings of Fact, *in Rebuttal* filed by SPEECHNOW.ORG, DAVID KEATING, FRED M. YOUNG, JR, EDWARD H. CRANE, III, BRAD RUSSO, SCOTT BURKHARDT. (Attachments: # 1 Declaration of Steven Simpson, # 2 Declaration of Jeffrey Milyo in Rebuttal, # 3 Declaration of Jon Coupal, # 4 Declaration of Paul Sherman, # 5 Declaration of Robert Frommer, # 6 Exhibit 35 of Steve Simpson, # 7 Exhibit 36 of Steve Simpson, # 8 Exhibit 37 of Steve Simpson, # 9 Exhibit 38 of Steve Simpson, # 10 Exhibit 39 of Steve Simpson, # 11 Exhibit 40 of Steve Simpson, # 12 Exhibit 41 of Steve Simpson, # 13 Exhibit 42 of Steve Simpson, # 14 Exhibit 43 of Steve Simpson, # 15

Exhibit 44 of Steve Simpson, # 16 Exhibit 45 of Steve Simpson, # 17 Exhibit 46 of Steve Simpson, # 18 Exhibit 47 of Steve Simpson, # 19 Exhibit 48 of Steve Simpson) (Simpson, Steven) (Entered: 11/21/2008)

11/21/2008 54 RESPONSE re 45 Proposed Findings of Fact, filed by SPEECHNOW.ORG, DAVID KEATING, FRED M. YOUNG, JR, EDWARD H. CRANE, III, BRAD RUSSO, SCOTT BURKHARDT. (Simpson, Steven) (Entered: 11/21/2008)

11/21/2008 55 RESPONSE re 54 Response to Document filed by FEDERAL ELECTION COMMISSION. (Attachments: # 1 Memorandum in Support, # 2 Exhibit 146, # 3 Exhibit 147, # 4 Exhibit 148, # 5 Exhibit 149, # 6 Exhibit 150, # 7 Exhibit 151, # 8 Exhibit 152, # 9 Exhibit 153, # 10 Exhibit 154, # 11 Exhibit 155, # 12 Exhibit 156, # 13 Exhibit 157, # 14 Exhibit 158, # 15 Exhibit 159, # 16 Exhibit 160, # 17 Exhibit 161, # 18 Exhibit 162, # 19 Exhibit 163)(Hajjar, Steve) (Entered: 11/21/2008)

11/21/2008 56 ENTERED IN ERROR.....REPLY re 44 Proposed Findings of Fact,,,,,,,, filed by FEDERAL ELECTION COMMISSION. (Hajjar, Steve)

		Modified on 11/24/2008 (tg,). (Entered: 11/21/2008)
11/24/2008		NOTICE OF CORRECTED DOCKET ENTRY: re 56 Reply to Document was entered in error and counsel was instructed to properly attach his document to an Errata pleading. (tg,) (Entered: 11/24/2008)
11/24/2008	57	ERRATA by FEDERAL ELECTION COMMISSION 55 Response to Document, filed by FEDERAL ELECTION COMMISSION. (Attachments: # 1 Memorandum in Support)(Hajjar, Steve) (Entered: 11/24/2008)
11/26/2008	58	ORDER granting defendant's motion for protective order 46 . Signed by Judge James Robertson on November 26, 2008. (MT) (Entered: 11/26/2008)
11/26/2008	59	MOTION for Extension of Time to File Response/Reply as to 51 First MOTION in Limine, 52 Second MOTION in Limine by FEDERAL ELECTION COMMISSION (Attachments: # 1 Text of Proposed Order) (Hajjar, Steve) (Entered: 11/26/2008)
12/04/2008	60	ERRATA by SPEECHNOW.ORG, DAVID KEATING, FRED M. YOUNG, JR, EDWARD H. CRANE, III, BRAD RUSSO, SCOTT

BURKHARDT 54 Response to Document filed by FRED M. YOUNG, JR., DAVID KEATING, EDWARD H. CRANE, III, SPEECHNOW.ORG, SCOTT BURKHARDT, BRAD RUSSO. (Attachments: # 1 Amended Table of Contents)(Simpson, Steven) (Entered: 12/04/2008)

12/09/2008 61 ORDER denying as moot motion for extension of time 59 . Signed by Judge James Robertson on December 9, 2008. (MT) (Entered: 12/09/2008)

12/12/2008 62 REPLY re 44 Proposed Findings of Fact,,,,,,, filed by SPEECHNOW. ORG, DAVID KEATING, FRED M. YOUNG, JR, EDWARD H. CRANE, III, BRAD RUSSO, SCOTT BURKHARDT. (Attachments: # 1 Declaration of Rodney Smith, # 2 Declaration of Paul Sherman, # 3 Declaration of Robert Gall)(Simpson, Steven) (Entered: 12/12/2008)

12/12/2008 63 REPLY re 45 Proposed Findings of Fact, *Memorandum in Support* filed by FEDERAL ELECTION COMMISSION. (Attachments: # 1 Memorandum in Support Reply Arguments Related to Plaintiffs' First Motion in Limine, # 2 Memorandum in Support Reply Arguments Related to Plaintiffs' Second Motion in Limine, # 3 Statement of Facts

		Reply Regarding Proposed Findings of Fact, # 4 Statement of Facts Response to Plaintiffs' Proposed Findings of Fact in Rebuttal, # 5 Exhibit 164, # 6 Exhibit 165, # 7 Exhibit 166, # 8 Exhibit 167, # 9 Exhibit 168, # 10 Exhibit 169)(Wilson, Graham) (Entered: 12/12/2008)
12/22/2008	64	MOTION for Leave to File *Reply Memorandum or, in the Alternative, Surreply* by SPEECHNOW.ORG, DAVID KEATING, FRED M. YOUNG, JR, EDWARD H. CRANE, III, BRAD RUSSO, SCOTT BURKHARDT (Attachments: # 1 Text of Proposed Order)(Simpson, Steven) (Entered: 12/22/2008)
01/05/2009	65	Memorandum in opposition to re 64 MOTION for Leave to File *Reply Memorandum or, in the Alternative, Surreply* filed by FEDERAL ELECTION COMMISSION. (Attachments: # 1 Text of Proposed Order)(Bonham, Robert) (Entered: 01/05/2009)
01/13/2009	66	REPLY to opposition to motion re 64 MOTION for Leave to File *Reply Memorandum or, in the Alternative, Surreply* filed by SPEECHNOW.ORG, DAVID KEATING, FRED M. YOUNG, JR, EDWARD H. CRANE, III, BRAD RUSSO, SCOTT BURKHARDT.

		(Simpson, Steven) (Entered: 01/13/2009)
02/03/2009		MINUTE ORDER granting plaintiffs' motion for leave to file 4 . Signed by Judge James Robertson on February 3, 2009. (MT) (Entered: 02/03/2009)
02/03/2009	67	Plaintiffs' SURREPLY Memorandum in Opposition to Defendant's Proposed Findings of Fact re 45 Proposed Findings of Fact, filed by SPEECHNOW.ORG, DAVID KEATING, FRED M. YOUNG, JR, EDWARD H. CRANE, III, BRAD RUSSO, SCOTT BURKHARDT. (tg,) (Entered: 02/06/2009)
05/20/2009	68	NOTICE *OF UPCOMING STATUS REPORT TO THE D.C. CIRCUIT REGARDING STATUS OF THESE PROCEEDINGS* by SPEECHNOW.ORG, DAVID KEATING, FRED M. YOUNG, JR, EDWARD H. CRANE, III, BRAD RUSSO, SCOTT BURKHARDT (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)(Simpson, Steven) (Entered: 05/20/2009)
06/11/2009	69	NOTICE TO PARTIES AND COUNSEL re Notice of Upcoming Status Report to the D.C. Circuit 68 . Signed by Judge James Robertson on June 11, 2008. (MT) (Entered: 06/11/2009)

08/18/2009	70	ORDER re submission of proposed findings by September 4, 2009. The Clerk is directed to set oral argument for the week of September 14, 2009. Signed by Judge James Robertson on August 18, 2009. (MT) (Entered: 08/18/2009)
08/26/2009		Set Hearings: Motion Hearing set for 9/14/2009 at 2:00 PM in Courtroom 23A before Judge James Robertson. (cp,) (Entered: 08/26/2009)
09/04/2009	71	Proposed Findings of Fact by SPEECHNOW.ORG, FEDERAL ELECTION COMMISSION. (Hajjar, Steve) (Entered: 09/04/2009)
09/14/2009		Minute Entry for proceedings held before Judge James Robertson: Motion Hearing held on 9/14/2009. 51 First MOTION in Limine filed by FRED M. YOUNG, JR., DAVID KEATING, EDWARD H. CRANE, III, SPEECHNOW.ORG, SCOTT BURKHARDT, BRAD RUSSO and 52 Second MOTION in Limine filed by FRED M. YOUNG, JR., DAVID KEATING, EDWARD H. CRANE, III, SPEECHNOW.ORG, SCOTT BURKHARDT, BRAD RUSSO. Joint, or separate, agreed Findings of Fact to be filed within one week. (Court Reporter Rebecca Stonestreet.) (zcp,) (Entered: 10/08/2009)

09/21/2009	72	Proposed Findings of Fact by SPEECHNOW.ORG, DAVID KEATING, FRED M. YOUNG, JR, EDWARD H. CRANE, III, BRAD RUSSO, SCOTT BURKHARDT, FEDERAL ELECTION COMMISSION. (Simpson, Steven) (Entered: 09/21/2009)
09/28/2009	73	MEMORANDUM AND FINDINGS. Signed by Judge James Robertson on September 28, 2009. (MT) (Entered: 09/28/2009)
09/29/2009		Supplemental Record on Appeal transmitted to US Court of Appeals re 38 Notice of Appeal and Findings of Fact by Judge James Robertson. (jeb,) (Entered: 09/29/2009)
01/21/2010	74	TRANSCRIPT OF PROCEEDINGS before Judge James Robertson held on September 14, 2009; Page Numbers: 1-19. Date of Issuance: January 21, 2010. Court Reporter/ Transcriber Rebecca Stonestreet, Telephone number 202-354-3249, Court Reporter Email Address : kingreporter2@verizon.net.<P></P> For the first 90 days after this filing date, the transcript may be viewed at the courthouse at a public terminal or purchased from the court reporter referenced above. After 90 days, the transcript may be accessed via PACER. Other transcript formats, (multi-page,

condensed, CD or ASCII) may be purchased from the court reporter.<P>NOTICE RE REDACTION OF TRANSCRIPTS: The parties have twenty-one days to file with the court and the court reporter any request to redact personal identifiers from this transcript. If no such requests are filed, the transcript will be made available to the public via PACER without redaction after 90 days. The policy, which includes the five personal identifiers specifically covered, is located on our website at ww.dcd.uscourts.gov.<P></P> Redaction Request due 2/11/2010. Redacted Transcript Deadline set for 2/22/2010. Release of Transcript Restriction set for 4/21/2010. (Stonestreet, Rebecca) (Entered: 01/21/2010)

05/10/2010 75 MANDATE of USCA (certified copy) as to 38 Notice of Appeal, filed by FRED M. YOUNG, JR., DAVID KEATING, EDWARD H. CRANE, III, SPEECHNOW.ORG, SCOTT BURKHARDT, BRAD RUSSO ; ORDERED and ADJUDGED that the contribution limits set forth in certified questions 1,2, and 3 cannot be constitutionally applied against SpeechNow and the individual plaintiffs; and there is no constitutional infirmity in the application

of the organizational, administrative, and reporting requirements set forth in certified questions 4 and 5; FURTHER ORDERED and ADJUDGED that the District Court's order denying injunctive relief be vacated and the case be remanded for further proceedings. USCA Case Number 08-5223. (mmh,) (Entered: 05/11/2010)

05/14/2010 76 MOTION for Entry of Final Judgment by SCOTT BURKHARDT, EDWARD H. CRANE, III, DAVID KEATING, BRAD RUSSO, SPEECHNOW.ORG, FRED M. YOUNG, JR (Attachments: # 1 Text of Proposed Order)(Simpson, Steven) (Entered: 05/14/2010)

05/27/2010 78 ORDER granting 76 Motion for Entry of Final Judgment. Signed by Judge James Robertson on 5/27/10. (cp,) (Entered: 06/01/2010)

05/28/2010 77 Memorandum in opposition to re 76 MOTION for Entry of Final Judgment filed by FEDERAL ELECTION COMMISSION. (Attachments: # 1 Text of Proposed Order)(Hajjar, Steve) (Entered: 05/28/2010)

06/11/2010 79 MOTION to Alter Judgment as to 78 Order on Motion for Entry of Final Judgment by FEDERAL ELECTION COMMISSION (Attachments:

		# 1 Declaration)(Hajjar, Steve) (Entered: 06/11/2010)
06/14/2010	80	Case Randomly Reassigned to Judge John D. Bates. Judge James Robertson no longer assigned to the case. (jeb,) (Entered: 06/14/2010)
06/25/2010	81	Memorandum in opposition to re 79 MOTION to Alter Judgment as to 78 Order on Motion for Entry of Final Judgment filed by SCOTT BURKHARDT, EDWARD H. CRANE, III, DAVID KEATING, BRAD RUSSO, SPEECHNOW.ORG, FRED M. YOUNG, JR. (Simpson, Steven) (Entered: 06/25/2010)
06/25/2010	82	NOTICE of Proposed Order by SCOTT BURKHARDT, EDWARD H. CRANE, III, DAVID KEATING, BRAD RUSSO, SPEECHNOW.ORG, FRED M. YOUNG, JR re 81 Memorandum in Opposition (Simpson, Steven) (Entered: 06/25/2010)
07/02/2010	83	REPLY to opposition to motion re 79 MOTION to Alter Judgment as to 78 Order on Motion for Entry of Final Judgment filed by FEDERAL ELECTION COMMISSION. (Hajjar, Steve) (Entered: 07/02/2010)

SIMPSON DECLARATION
EXHIBIT 36

Summary of PAC Independent Expenditures
1995-96

	For	Against	Total
Presidential	$322,000	$1,089,389	$1,411,389
Senate	$3,244,652	$1,065,542	$4,310,194
House	$3,172,690	$1,658,094	$4,830,784
Total	$6,739,342	$3,813,025	$10,552,367

Independent Expenditures by Committee Type

	For		Against		
	# of Cmte's	Amount	# of Cmte's	Amount	Total
Corporation	3	$10,946	2	$364,851	$375,797
Labor Organization	13	$422,970	1	$200,930	$623,900
No Connected Organization	65	$3,498,365	30	$1,036,087	$4,534,452
Trade/Membership/Health	16	$2,612,390	11	$2,016,024	$4,628,414
Cooperative	1	$4,916	0	$0	$4,916
Corp. w/o Stock	10	$189,755	2	$195,133	$384,888
Total	108	$6,739,342	46	$3,813,025	$10,552,367

Note: Includes expenditures made in 1995-96 for candidates involved in prior elections.

The following amounts were spent on 1996 campaigns:

	For	Against
President	$322,000	$1,089,389
Senate	$3,235,855	$924,026
House	$2,901,580	$1,632,195

[SEAL]

1997-98

Summary of PAC Independent Expenditures

	For	Against	Total
Presidential	$657	$24,401	$25,058
Senate	$2,108,848	$780,891	$2,889,739
House	$5,753,589	$667,315	$6,420,904
Total	$7,863,094	$1,472,607	$9,335,701

Independent Expenditures by Committee Type

	For		Against		
	# of Cmte's	Amount	# of Cmte's	Amount	Total
Corporation	11	$29,867	1	$24,401	$54,268
Labor Organization	22	$1,454,355	1	$3,238	$1,457,593
No Connected Organization	31	$2,164,710	11	$248,165	$2,412,875
Trade/Membership/ Health	21	$4,118,790	5	$1,193,345	$5,312,135
Cooperative	1	$4,981	0	$0	$4,981
Corp. w/o Stock	10	$90,391	1	$3,458	$93,849
Total	96	$7,863,094	19	$1,472,607	$9,335,701

Note: Includes expenditures made in 1997-98 for candidates involved in prior elections.

The following amounts were spent on 1998 campaigns:

	For	Against
President	$0	$0
Senate	$1,963,748	$795,343
House	$5,584,502	$680,505

1999-2000
Summary of PAC Independent Expenditures

	For	Against	Total
Presidential	$5,704,475	$427,007	$6,131,482
Senate	$4,533,830	$2,492,413	$7,026,243
House	$6,264,531	$1,619,533	$7,884,064
Total	$16,502,836	$4,538,953	$21,041,789

Independent Expenditures by Committee Type

	For		Against		
	# of Cmte's	Amount	# of Cmte's	Amount	Total
Corporation	13	$95,305	3	$42,230	$137,535
Labor Organization	24	$2,622,123	3	$203,717	$2,825,840
No Connected Organization	57	$4,711,107	24	$878,063	$5,589,170
Trade/Membership/ Health	24	$8,949,143	7	$2,194,759	$11,143,902
Cooperative	1	$4,958	0	$0	$4,958
Corp. w/o Stock	6	$120,200	1	$1,220,184	$1,340,384
Total	125	$16,502,836	38	$4,538,953	$21,041,789

Note: Includes expenditures made in 1999-2000 for candidates involved in prior elections.

The following amounts were spent on 2000 campaigns:

	For	Against
President	$5,704,475	$416,620
Senate	$4,448,447	$2,339,778
House	$6,109,620	$1,618,181

2001-2002
Summary of PAC Independent Expenditures

	For	Against	Total
Presidential	$57,678	$0	$57,678
Senate	$8,010,081	801,340	$8,811,421
House	$4,650,674	$488,246	$5,138,920
Total	$12,718,433	$1,289,586	$14,008,019

Independent Expenditures by Committee Type

	For		Against		
	# of Cmte's	Amount	# of Cmte's	Amount	Total
Corporation	9	$52,190	0	$0	$52,190
Labor Organization	14	$3,546,994	3	$12,525	$3,559,519
No Connected Organization	34	$2,095,072	10	126,489	$2,221,561
Trade/Membership/ Health	25	$6,941,576	6	$1,150,572	$8,092,148
Cooperative	0	$0	0	$0	$0
Corp. w/o Stock	6	$82,601	0	$0	$82,601
Total	88	$12,718,433	19	$1,289,586	$14,008,019

Note: Includes expenditures made in 2001-2002 for candidates involved in prior elections.

The following amounts were spent on 2002 campaigns:

	For	Against
President	$0	$0
Senate	$7,680,345	$794,549
House	$4,557,827	$451,603
	$12,238,172	$1,246,152

2003-2004
Summary of PAC Independent Expenditures

	For	Against	Total
Presidential	$35,642,206	$7,828,869	$43,471,075
Senate	$7,154,209	$325,034	$7,479,243
House	$5,806,117	$617,957	$6,424,074
Total	$48,602,532	$8,771,860	$57,374,392

Independent Expenditures by Committee Type

	For		Against		
	# of Cmte's	Amount	# of Cmte's	Amount	Total
Corporation	12	$223,729	0	$0	$223,729
Labor Organization	31	$19,469,562	5	$1,267,811	$20,737,373
No Connected Organization	68	$14,188,703	42	$3,970,430	$18,159,133
Trade/Membership/ Health	39	$14,647,527	11	$3,490,542	$18,138,069
Cooperative	1	$4,993	0	$0	$4,993
Corp. w/o Stock	7	$68,018	1	$43,077	$111,095
Total	158	$48,602,532	59	$8,771,860	$57,374,392

Note: Includes expenditures made in 2003-2004 for candidates involved in prior elections.

The following amounts were spent on 2004 campaigns:

	For	Against
President	$35,641,990	$7,828,869
Senate	$6,756,565	$325,034
House	$4,914,938	$516,543
	$47,313,493	$8,670,446

2005-2006
Summary of PAC Independent Expenditures

	For	Against	Total
Presidential	$199,116	$140,140	$339,256
Senate	$9,444,064	$1,753,882	$11,197,946
House	$13,376,401	$12,908,656	$26,285,057
Total	$23,019,581	$14,802,678	$37,822,259

Independent Expenditures by Committee Type

	For		Against		
	# of Cmte's	Amount	# of Cmte's	Amount	Total
Corporation	16	$247,273	2	$3,072	$250,345
Labor Organization	25	$4,190,105	8	$5,866,342	$10,056,447
No Connected Organization	59	$3,782,315	34	$4,300,698	$8,083,013
Trade/Membership/ Health	54	$14,439,440	19	$4,611,300	$19,050,740
Cooperative	1	$3,865	0	$0	$3,865
Corp. w/o Stock	7	$356,583	3	$21,266	$377,849
Total	162	$23,019,581	66	$14,802,678	$37,822,259

Note: Includes expenditures made in 2005-2006 for candidates involved in prior elections.

The following amounts were spent on 2006 campaigns:

	For	Against
President	$0	$0
Senate	$9,308,217	$1,753,882
House	$13,193,910	$12,904,845
	$22,502,127	$14,658,727

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SPEECHNOW.ORG, ET AL., Plaintiffs, v. FEDERAL ELECTION COMMISSION 999 E St. NW Washington, DC 20463, Defendant.	Civ. No. 08-248 (JR) FEC Exhibits

FEC EXHIBIT 99

Summary of PAC Activity
1990-2006

Committee Type	No. of Cmte's	Total Receipts	Total Disbursements	Contributions to Candidates	Cash on Hand	Debts owed By
Corporate						
2005-2006	1,808	$278,345,927	$277,846,209	$135,925,970	$85,453,476	$174,098
2003-2004	1,756	$238,984,115	$221,602,957	$115,641,547	$77,887,321	$238,885
2001-2002	1,741	$191,656,789	$178,277,372	$99,577,798	$60,419,821	$602,558
1999-2000	1,725	$164,454,559	$158,329,869	$91,525,699	$47,911,630	$276,063
1997-98	1,821	$144,115,389	$137,570,423	$78,018,750	$41,087,447	$573,964
1995-96	1,836	$133,793,654	$130,624,843	$78,194,723	$34,362,856	$792,307
1993-94	1,875	$114,995,661	$116,814,143	$69,610,433	$31,182,618	$233,601
1991-92	1,930	$112,517,482	$112,389,798	$68,430,976	$32,935,787	$146,736
1989-90	1,972	$106,474,773	$101,055,267	$58,131,722	$32,863,915	$124,988
Labor						
2005-2006	312	$218,185,504	$197,386,182	$55,815,069	$79,880,417	$4,253,743
2003-2004	328	$191,651,043	$182,949,736	$52,103,572	$60,642,326	$3,202,361
2001-2002	337	$167,820,067	$157,972,836	$53,897,795	$53,357,427	$135,603
1999-2000	350	$136,011,151	$128,692,390	$51,573,364	$43,648,139	$138,558
1997-98	353	$111,312,402	$98,247,303	$44,606,983	$44,098,132	$395,730
1995-96	358	$104,059,450	$99,768,350	$47,980,492	$28,993,830	$1,119,229
1993-94	371	$90,303,181	$88,437,349	$41,867,393	$25,569,813	$105,353
1991-92	372	$89,935,941	$94,604,526	$41,357,222	$23,759,915	$250,603
1989-90	372	$88,926,833	$84,615,373	$34,732,029	$27,983,139	$77,785
Non Connected						
2005-2006	1,797	$352,947,674	$354,532,003	$70,217,568	$50,523,057	$5,240,017
2003-2004	1,650	$289,423,580	$255,174,076	$52,467,328	$43,774,829	$8,999,470
2001-2002	1,401	$166,652,339	$165,680,186	$46,362,859	$23,576,577	$7,817,072
1999-2000	1,362	$144,266,748	$139,662,019	$37,297,383	$20,248,157	$13,409,452
1997-98	1,326	$114,321,557	$107,775,031	$28,154,544	$17,223,500	$9,805,704
1995-96	1,259	$81,165,399	$81,265,563	$23,960,110	$10,734,975	$9,520,705
1993-94	1,318	$76,860,606	$75,060,494	$18,201,369	$12,704,604	$10,017,850
1991-92	1,376	$73,810,989	$76,232,864	$18,326,404	$10,362,731	$10,735,908
1989-90	1,321	$71,569,940	$71,382,835	$15,070,009	$11,638,505	$9,979,974
Trade/Membership/Health						
2005-2006	1,019	$218,448,147	$208,862,724	$101,803,507	$64,340,251	$1,459,007
2003-2004	986	$181,837,429	$170,064,226	$83,221,870	$53,368,093	$1,118,162
2001-2002	956	$145,781,414	$141,276,055	$75,146,673	$41,056,855	$1,351,440
1999-2000	900	$142,870,952	$137,150,301	$71,802,756	$36,309,930	$1,008,024
1997-98	921	$119,576,494	$114,365,202	$62,322,845	$30,968,879	$1,531,525
1995-96	896	$105,956,146	$105,355,853	$60,153,725	$25,607,325	$1,279,293
1993-94	852	$96,372,055	$94,122,563	$52,853,630	$24,725,908	$770,934
1991-92	835	$95,740,556	$97,471,784	$53,870,702	$22,933,660	$557,168
1989-90	801	$92,516,400	$88,095,809	$44,804,886	$25,055,781	$414,278

Cooperative						
2005-2006	40	$6,166,566	$5,623,900	$3,454,915	$2,936,503	$0
2003-2004	38	$4,187,378	$3,895,437	$2,872,363	$2,362,987	$0
2001-2002	41	$3,680,041	$3,645,829	$2,656,875	$2,188,944	$0
1999-2000	41	$3,716,550	$3,297,957	$2,360,236	$2,201,864	$0
1997-98	45	$4,468,403	$4,345,123	$2,411,076	$1,862,833	$0
1995-96	45	$3,897,164	$4,195,374	$3,006,471	$1,727,426	$0
1993-94	56	$4,377,763	$4,516,979	$3,035,003	$2,011,400	$0
1991-92	61	$4,794,929	$4,891,433	$2,961,140	$2,151,806	$48,046
1989-90	60	$4,974,122	$4,830,175	$2,950,960	$2,264,517	$35,869
Corporation without Stock						
2005-2006	115	$11,441,713	$11,063,119	$4,885,718	$3,309,865	$458,418
2003-2004	109	$9,639,838	$9,247,934	$4,182,321	$3,681,822	$368,697
2001-2002	118	$9,714,903	$9,618,199	$4,399,446	$3,680,856	$372,424
1999-2000	121	$13,591,109	$12,225,794	$5,270,336	$3,314,652	$424,940
1997-98	133	$8,782,595	$8,527,765	$4,429,368	$2,805,540	$335,468
1995-96	134	$8,500,508	$8,677,836	$4,535,098	$2,481,467	$399,973
1993-94	149	$8,850,851	$9,151,115	$4,063,291	$2,773,239	$336,452
1991-92	153	$8,730,610	$9,195,491	$3,981,324	$3,011,989	$219,349
1989-90	151	$7,629,909	$7,669,098	$3,431,890	$3,534,686	$159,796
Total						
2005-2006	5,091	$1,085,535,531	$1,055,314,137	$372,102,747	$286,443,569	$11,585,283
2003-2004	4,867	$915,723,383	$842,934,366	$310,489,001	$241,717,378	$13,927,575
2001-2002	4,594	$685,305,553	$656,470,477	$282,041,446	$184,280,480	$10,279,097
1999-2000	4,499	$604,911,069	$579,358,330	$259,829,774	$153,634,372	$15,257,037
1997-98	4,599	$502,576,840	$470,830,847	$219,943,566	$138,046,331	$12,642,391
1995-96	4,528	$437,372,321	$429,887,819	$217,830,619	$103,907,879	$13,111,507
1993-94	4,621	$391,760,117	$388,102,643	$189,631,119	$98,967,582	$11,464,190
1991-92	4,727	$385,530,507	$394,785,896	$188,927,768	$95,155,888	$11,957,810
1989-90	4,677	$372,091,977	$357,648,557	$159,121,496	$103,340,543	$10,792,690

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(3)

No. 10-145

In the Supreme Court of the United States

DAVID KEATING, ET AL., PETITIONERS

v.

FEDERAL ELECTION COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the en banc court of appeals correctly held that the reporting, organizational, and administrative requirements of the Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.*, are constitutional as applied to the treasurer of a group whose major purpose is the making of independent expenditures to elect or defeat clearly identified federal candidates.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-26) is reported at 599 F.3d 686. The order of the district court making findings of fact and certifying constitutional questions to the en banc court of appeals (Pet. App. 31-53) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 27-28) was entered on March 26, 2010. On June 17, 2010, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 23, 2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, imposes certain reporting, disclosure, and organizational requirements on entities falling within the FECA definition of the term "political committee." This case concerns whether those requirements violate the First Amendment as applied to a particular organization.

a. FECA defines the term "political committee" to include "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. 431(4)(A). The term "contribution" is defined to include "any gift * * * or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. 431(8)(A)(i). The term "expenditure" includes "any purchase, payment, * * * or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. 431(9)(A)(i).

In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court adopted a limiting construction of the term "political committee." The Court concluded that the statutory definition of "political committee" raised potential overbreadth concerns and that the phrase "for the purpose of . . . influencing," used in defining the incorporated term "expenditure," was vague. *Id.* at 77, 79. The Court therefore narrowly construed the definition, so that a group will not be deemed a "political committee" under FECA unless, in addition to crossing the $1000 threshold of contributions or expenditures, the organization either is "under the control of a candidate" or has as its "major purpose * * * the nomination or

election of a candidate." *Id.* at 79. The Court explained that expenditures of "political committees," as so narrowly defined, "can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related." *Ibid.*

Once a group qualifies as a political committee, it has ten days to file a statement of organization with the Federal Election Commission (FEC or Commission). 2 U.S.C. 433(a). The political committee must thereafter file periodic reports disclosing receipts and disbursements in excess of $200 in a calendar year (and, in some instances, receipts and disbursements of lesser amounts). See 2 U.S.C. 433-434. Political committees must also identify themselves through "disclaimers" on all of their general public political advertising, on their websites, and in mass e-mails. 11 C.F.R. 110.11(a)(1).

b. Persons that are not political committees are not subject to the requirements discussed above, but they trigger different reporting requirements when they make an "independent expenditure." That term is defined as an expenditure "expressly advocating the election or defeat of a clearly identified candidate" that "is not made in concert or cooperation with or at the request or suggestion" of the candidate or the candidate's agents or a political party committee or its agents. 2 U.S.C. 431(17). A person (other than a political committee) must file a report for each quarter in which the person has made independent expenditures, if the aggregate total spent on independent expenditures exceeds $250 for the calendar year. 2 U.S.C. 434(c). Each quarterly report contains information about the independent expenditure and each person who made a contribution in excess of $200 "for the purpose of furthering an independent expenditure." 2 U.S.C. 434(c)(2)(A)-(C).

All persons, including political committees, that make independent expenditures shortly before Election Day that exceed certain thresholds must disclose information about the expenditures to the Commission within 24 or 48 hours. 2 U.S.C. 434(g). And all persons that make independent-expenditure communications through certain specified media must include in each communication a disclaimer providing information about who paid for the communication. See 2 U.S.C. 441d(a). The disclaimer must provide the name of, and contact information for, the maker of the independent expenditure and state whether the communication is authorized by any candidate or by any candidate's authorized committee. 2 U.S.C. 441d(a)(3). Radio or television independent expenditures must contain an additional oral or visual disclaimer stating that the person paying for the communication "is responsible for the content of this advertising." 2 U.S.C. 441d(d)(2).

2. SpeechNow.org is an unincorporated nonprofit association organized under District of Columbia law and registered as a "political organization" under the Internal Revenue Code, 26 U.S.C. 527. Pet. App. 34. Petitioner David Keating is the founder and one of five voting "members" of SpeechNow and serves as its president and treasurer. *Id.* at 35, 256. He administers all of the association's affairs. *Id.* at 35, 37. In particular, as treasurer, he is responsible for complying with the applicable requirements of FECA. *Id.* at 50.[1]

SpeechNow's purpose is to "expressly advocat[e] the election of candidates" who agree with, "and the defeat

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[1] The other petitioners are prospective donors to SpeechNow, and one, Edward Crane, is also a voting "member." Pet. App. 34, 38-39. SpeechNow itself is not a party to the proceedings in this Court. See Pet. ii; note 3, *infra*.

of candidates who oppose," SpeechNow's positions on the "rights to free speech and association." Pet. App. 37. SpeechNow plans to undertake its express advocacy through advertisements on television and other media. *Id.* at 42. SpeechNow's bylaws state that it will not coordinate its expenditures with candidates or political parties and that it will not make contributions to candidates or political committees. *Id.* at 36. The bylaws also provide that SpeechNow will not accept any donations from candidates, political parties, political committees, corporations, labor organizations, national banks, federal government contractors, or foreign nationals. *Id.* at 35.

3. In February 2008, the individual petitioners and SpeechNow filed a complaint alleging that various provisions of FECA governing political committees violated the First Amendment as applied to them. Pet. App. 286.[2] They filed an amended as-applied complaint in July 2008. *Id.* at 295. As relevant here, petitioner Keating contended that, although SpeechNow did not object to complying with FECA's disclaimer and reporting requirements for independent expenditures by groups other than political committees, see pp. 3-4, *supra*; Pet. 2; Pet. App. 48-49, the full disclosure and organizational requirements applicable to political committees cannot constitutionally be applied to SpeechNow. Pet. App. 22.

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[2] Before filing suit, SpeechNow sought an advisory opinion from the Commission, see 2 U.S.C. 437f, to address whether FECA requires SpeechNow to register as a political committee and to treat the donations it receives as "contributions." Pet. App. 179-221. The Commission could not issue the requested opinion at that time because it lacked a sufficient number of voting members. *Id.* at 222-223; see 2 U.S.C. 437c(c), 437d(a)(7).

Petitioners sued under a special judicial-review provision, 2 U.S.C. 437h, which permits individuals to request the en banc court of appeals to determine the constitutionality of "any provision" of FECA. Under Section 437h, the district court makes findings of fact and certifies nonfrivolous constitutional questions to the court of appeals sitting en banc.[3]

4. The district court certified five questions of law to the en banc court of appeals. Pet. App. 7-8, 33-34. Only the fourth certified question is at issue here. That question was:

> Whether the organizational, administrative, and continuous reporting requirements set forth in 2 U.S.C. §§ 432, 433, and 434(a) violate the First Amendment by requiring David Keating, SpeechNow.org's president and treasurer, to register SpeechNow.org as a political committee, to adopt the organizational structure of a political committee, and to comply with the continuous reporting requirements that apply to political committees.

Ibid. The first three certified questions, which are not at issue here, concerned petitioners' claim that FECA's

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[3] An organization like SpeechNow is not among those authorized to seek review under Section 437h, so SpeechNow was not a party to the proceedings before the en banc court of appeals on the certified questions. Pet. App. 6. In the district court, petitioners and SpeechNow also sought a preliminary injunction to prevent the Commission from enforcing against them FECA's contribution limits. *Id.* at 286-287. The district court denied preliminary injunctive relief, and petitioners and SpeechNow appealed under 28 U.S.C. 1292(a)(1). The court of appeals then consolidated the preliminary-injunction appeal with the en banc Section 437h proceedings. Pet. App. 6. Because the preliminary-injunction appeal is not at issue here, SpeechNow is not a party in this Court. Pet. ii.

limits on contributions to SpeechNow violated petitioners' First Amendment rights. *Id.* at 33.[4]

The district court also found certain facts, to which the parties substantially agreed. Pet. App. 34-53; see *id.* at 33. In particular, the court found that if SpeechNow were to accept donations in excess of $1000, SpeechNow satisfies the other criteria for political-committee status and would be required under FECA to register as a political committee. *Id.* at 49; see *id.* at 273.

5. The en banc court of appeals unanimously found "no constitutional infirmity in the application of the organizational, administrative, and reporting requirements set forth in certified question[ ] 4." Pet. App. 25. The court of appeals therefore answered that question in the negative. Separately, the court of appeals held that FECA's contribution limitations "cannot be constitutionally applied against SpeechNow and the individual [petitioners]." *Id.* at 27-28; see *id.* at 10-20. The government has not sought review of the latter holding.

In rejecting petitioners' challenge to the reporting and organizational requirements, the court of appeals contrasted disclosure requirements with regulations limiting a person's ability to spend money on political speech. "[D]isclosure requirements," the court stated, "'impose no ceiling on campaign-related activities,' and 'do not prevent anyone from speaking.'" Pet. App. 20 (quoting *Buckley*, 424 U.S. at 64, and *McConnell* v. *FEC*,

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[4] The fifth certified question concerned whether Keating as treasurer could postpone complying with the registration and reporting requirements for a political committee if the court of appeals decided that those requirements could constitutionally be applied to Keating and SpeechNow. Pet. App. 8, 34. The court of appeals unanimously upheld the applicable FECA timing requirements, *id.* at 25, 28, and petitioners have not sought review of that ruling in this Court.

540 U.S. 93, 201 (2003)) (citation omitted). As a consequence, the court explained, this Court has held that disclosure requirements are subject to less stringent review than are restrictions on expenditures. To establish a disclosure requirement's validity, the government may "point to any 'sufficiently important' governmental interest that bears a 'substantial relation' to the disclosure requirement." *Id.* at 21 (quoting *Citizens United v. FEC*, 130 S. Ct. 876, 914 (2010)). The court of appeals also noted that an interest can be sufficiently important to support a disclosure requirement even if it would not support an outright restriction on speech such as an expenditure limit. *Id.* at 20-21.

Applying that standard, the court of appeals concluded that two governmental interests—in information and enforcement—are "sufficiently important * * * to justify requiring SpeechNow to organize and report to the FEC as a political committee." Pet. App. 25. First, the court explained that this Court had upheld organizational and reporting requirements—including the same requirements at issue here—on the basis of the government's interest in providing the electorate with information about the sources that fund election activity. *Id.* at 21 (discussing *Buckley*, *McConnell*, and *Citizens United*). In particular, the court of appeals noted, this Court in *Buckley* upheld "the requirements of §§ 432, 433, and 434(a) at issue here." *Ibid.*

Second, the court of appeals concluded that the required disclosures for political committees also serve the important governmental interest in "deter[ring] and help[ing to] expose violations of other campaign finance restrictions." Pet. App. 25. The court cited as an example the restrictions "barring contributions from foreign corporations or individuals." *Ibid.*

The court of appeals further explained that the applicable reporting and organizational requirements impose only a minimal burden on SpeechNow. Pet. App. 22-24. The court noted petitioners' expressed intent that SpeechNow would comply with the disclaimer and disclosure requirements that apply to individuals or groups that are not political committees. See *id.* at 22-23. The court concluded that the additional reporting requirements that would apply to SpeechNow if it became a political committee are "minimal" because SpeechNow intends only to make independent expenditures, and the attendant disclosure requirements overlap substantially with the requirements with which SpeechNow concedes it must comply. *Ibid.*; see *id.* at 24. The court further found that organizational requirements such as designating a treasurer and retaining records would not "impose much of an additional burden upon SpeechNow, especially given the relative simplicity with which SpeechNow intends to operate." *Id.* at 23.

6. On September 13, 2010, after the petition for a writ of certiorari was filed, the FEC received SpeechNow's Statement of Organization registering as a political committee and appointing Keating treasurer. See Statement of Organization, http://images.nictusa.com/pdf/379/10030422379/10030422379.pdf.

ARGUMENT

The court of appeals correctly rejected petitioners' as-applied challenge to FECA's disclosure, organizational, and administrative requirements for political committees, and its disposition of that challenge does not conflict with any decision of this Court. Petitioners do not assert that the judgment conflicts with any deci-

sion of another court of appeals. Further review therefore is not warranted.

The ruling that petitioners challenge does not restrict the amount of money that SpeechNow may raise and spend on independent communications in support of (or in opposition to) candidates for federal office. Unlike the plaintiff organization in *Citizens United* before this Court decided that case, SpeechNow may spend as much money as it can raise. And under the court of appeals' separate holding, not challenged here, SpeechNow can take in contributions from individuals in unlimited amounts. Nor, despite petitioners' repeated assertions to the contrary, see Pet. 2, 4, 11, 12, 21, 26, does the question presented concern any distinction between corporate and unincorporated entities. Rather, the question in this case is whether the Constitution precludes the application to SpeechNow of the reporting, disclosure, and organizational obligations that apply to all political committees, incorporated and unincorporated alike.[5]

1. a. The court of appeals correctly applied the standard of exacting scrutiny that this Court has used for more than 30 years in reviewing reporting and disclosure provisions. In cases from *Buckley* to *Citizens United*, this Court has distinguished disclosure, reporting, and administrative requirements from limits on expenditures. *Buckley*, 424 U.S. at 64. That constitutional distinction reflects the fact that "disclosure requirements * * * do not prevent anyone from speaking." *Citizens United*, 130 S. Ct. at 914 (internal quotation marks and citations omitted). Accordingly, the Court in

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[5] Many political committees incorporate for liability purposes. See 11 C.F.R. 114.12(a).

Buckley adopted a standard of review, "exacting scrutiny," 424 U.S. at 64, that differs from the "strict scrutiny" this Court applies to expenditure limits, see, *e.g.*, *Citizens United*, 130 S. Ct. at 898. As the Court recently explained, "'exacting scrutiny' * * * requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Id.* at 914 (quoting *Buckley*, 424 U.S. at 64, 66).

Since *Buckley*, the Court has used "exacting scrutiny" as the standard for evaluating various campaign-related disclosure requirements. See, *e.g.*, *Doe* v. *Reed*, 130 S. Ct. 2811, 2818 (2010) (disclosure of signatures on referendum petitions); *McConnell*, 540 U.S. at 196; *Buckley* v. *American Constitutional Law Found., Inc.*, 525 U.S. 182, 202 (1999) (disclosure of expenditures to get referendum on ballot). Indeed, although the Court in *Buckley* focused on the interests that support disclosure of contributions to candidates, the Court did not hold that the validity of FECA's reporting and disclosure requirements depended on a group's particular spending pattern. See 424 U.S. at 60-84. Because the FECA provisions that petitioners challenge in this Court do not limit SpeechNow's ability to raise or spend funds to speak as it sees fit, but require only that SpeechNow disclose the origins and destination of those funds (and take accompanying administrative steps), the court of appeals properly applied this Court's intermediate "exacting scrutiny" standard rather than the strict scrutiny applicable to speech prohibitions.

b. Petitioners contend (Pet. 10, 21-22) that the court of appeals should have applied strict scrutiny. Petitioners' argument fails because it is based on the flawed premise (Pet. 21) that the disclosure requirements at issue in this case are analogous to the expenditure limi-

tation at issue in *Citizens United*—*i.e.*, that requiring SpeechNow to register as a political committee is equivalent to forbidding Citizens United from electioneering except through a "separate segregated fund," which is only one type of political committee among many. 2 U.S.C. 431(4)(B); 11 C.F.R. 100.5(b). Despite petitioners' repeated attempts to liken SpeechNow to the corporation at issue in *Citizens United* (*e.g.*, Pet. 2, 9-10, 15, 16, 17, 19, 20, 21-22, 25), the analogy fails. Unlike the separate segregated fund alternative (what this Court called the "PAC alternative") that this Court considered in *Citizens United*, the requirement that SpeechNow register as a political committee does not prevent the organization from engaging in campaign advocacy in its own name and with its own treasury funds.

In both *Citizens United* and *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), this Court considered 2 U.S.C. 441b, which precluded corporations from spending their treasury funds to expressly advocate the election or defeat of a federal candidate. Although a corporation could form a separate segregated fund to finance express advocacy, the fund could not use money from the corporation for that advocacy. See 2 U.S.C. 441b(b)(2)(C); 11 C.F.R. 114.1(a)(2)(iii), 114.2(b)(2). Rather, it could raise money only from individuals having specified connections with the corporation, and then only under various rules concerning the time, manner, and frequency of solicitation. See 2 U.S.C. 441b(b)(4); 11 C.F.R. 114.5-114.8.

In *Citizens United*, this Court concluded that Section 441b was "a ban on corporate speech[,] notwithstanding the fact that a PAC created by a corporation can still speak," in part because "[a] PAC is a separate association from the corporation." 130 S. Ct. at 897; see *MCFL*,

479 U.S. at 252 (plurality opinion) ("[T]he corporation is *not* free to use its general funds for campaign advocacy purposes."). The Court also concluded that PACs were burdensome and expensive to establish and administer. *Citizens United*, 130 S. Ct. at 897-898. For those reasons, the Court treated Section 441b as "a ban on speech" warranting strict scrutiny. *Id.* at 898.

The FECA provisions at issue here impose no such prohibition. SpeechNow is not barred from speaking, nor is it required to create a separate entity to do so. Indeed, SpeechNow is not a corporation. Pet. App. 34. Accordingly, both before and after *Citizens United*, SpeechNow was free to spend unlimited amounts on independent expenditures expressly advocating the election or defeat of federal candidates, and to do so without creating a separate segregated fund. See *FEC* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 490-501 (1985). And under a different holding of the court of appeals that is not at issue here (see Pet. App. 10-20, 27-28; p. 7, *supra*), SpeechNow can receive unlimited contributions from any individual donor.

Accordingly, petitioners are incorrect in arguing (Pet. 22) that, under *Citizens United*, a requirement to register as a political committee is subject to strict scrutiny. Although the Court characterized the political-committee reporting and registration requirements as "burdensome" in the context of a corporation's creating a separate segregated fund (*i.e.*, setting up a separate entity to engage in express advocacy while the corporation itself was prohibited from doing so), this case involves no "ban on speech." Compare *Citizens United*, 130 S. Ct. at 897, 898 (bans on speech require strict scrutiny), with *id.* at 914 (even if burdensome, disclosure requirements "do not prevent anyone from speaking"

and are not reviewed under strict scrutiny) (citation omitted).

2. a. The court of appeals correctly applied this Court's precedents in recognizing two important governmental interests that support the disclosure and administrative requirements at issue here. Pet. App. 21-22, 24-25. Indeed, this Court expressly recognized both of those interests in *Buckley*.

First, the required data inform the electorate "as to where political campaign money comes from." *Buckley*, 424 U.S. at 66. Information about expenditures expressly supporting and opposing candidates helps voters "to define more of the candidates' constituencies," *id.* at 81 (upholding FECA's independent expenditure reporting requirements for individuals and groups other than political committees), and to identify "the interests to which a candidate is most likely to be responsive," *id.* at 66-67. Most recently, in *Citizens United*, the Court held that "the informational interest alone is sufficient" to sustain a requirement to disclose "who is speaking about a candidate shortly before an election." 130 S. Ct. at 915-916. And this Court applied that holding to disclosure of the funding sources of advertisements "even if" those advertisements "only pertain[ed] to a commercial transaction," *i.e.*, urged viewers to watch a candidate-related movie. *Id.* at 915. Information about the sort of express electoral advocacy in which SpeechNow plans to engage, Pet. App. 37, 44, is even more central to an informed consumer in "the political marketplace" than was the information required to be disclosed in *Citizens United*. 130 S. Ct. at 915.[6]

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[6] Indeed, disclosure of funding sources is even more important with respect to SpeechNow than for most other political committees, which

Second, the Court in *Buckley* stated that FECA's "recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations." 424 U.S. at 67-68. Similarly in *McConnell*, the Court upheld mandatory disclosure requirements based on the interest in "gathering the data necessary to enforce more substantive electioneering restrictions." 540 U.S. at 196; see *id.* at 200-201 (upholding compelled disclosure of executory contracts to avoid creating "a significant loophole" in disclosure requirements); *id.* at 237 (upholding broadcast station recordkeeping provisions to "provide an independently compiled set of data for purposes of verifying candidates' compliance with the disclosure requirements and source limitations of [campaign-finance law]"). As the court of appeals correctly concluded (Pet. App. 24-25), the requirements challenged here serve the important governmental interest in deterring and exposing violations of campaign finance restrictions. For example, SpeechNow's bylaws state that the organization will not accept contributions from foreign nationals or federal government contractors. See *id.* at 35; see also 2 U.S.C. 441c(a) (prohibition of contributions by government contractors), 441e (prohibition of contributions and donations by foreign nationals). Full reporting and disclosure will help the FEC and the public monitor SpeechNow's compliance with these restrictions.

b. Petitioners do not address these important governmental interests directly. Rather, they contend that

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are limited to raising money from individuals in amounts no greater than $5000. Under the court of appeals' decision, petitioner may raise money in unlimited amounts, and one or a few individuals may now finance substantial portions of SpeechNow's operations.

these interests must be invalid because they would have supported requiring Citizens United and MCFL "to become PACs." Pet. 24. But as explained above, in neither *Citizens United* nor *MCFL* did the Court consider a requirement to register the organization itself as a political committee. Those plaintiffs did not meet the "major purpose" criterion for political-committee status, much less devote themselves *entirely* to electoral advocacy as SpeechNow does, and their spending could not be presumed to be campaign-related.

Contrary to the suggestion of petitioners (Pet. 30) and their amici (Br. 2, 25), anticorruption interests are not the only valid basis for disclosure requirements. As the court of appeals correctly recognized, "[b]ecause disclosure requirements inhibit speech less than do contribution and expenditure limits," this Court "has not limited the government's acceptable interests to anticorruption alone." Pet. App. 20-21. Thus, even though the Court in *Citizens United* invalidated FECA's ban on corporate-financed independent expenditures because it concluded that independent expenditures pose no danger of corruption, it held that the informational interest justified mandatory disclosure regarding the same expenditures. 130 S. Ct. at 908-909, 913-916. That holding was based in turn on *Buckley*, in which the Court upheld disclosure requirements while invalidating a cap on spending. *Id.* at 915 (citing *Buckley*, 424 U.S. at 75-76). Likewise, the Court had earlier upheld registration and disclosure requirements for lobbyists even though Congress cannot constitutionally ban lobbying itself. See *ibid.* (citing *United States* v. *Harriss*, 347 U.S. 612, 625 (1954)).

Petitioners' reliance (Pet. 22-23) on *Davis* v. *FEC*, 128 S. Ct. 2759 (2008), is misplaced. In *Davis*, this Court

struck down a set of asymmetrical contribution limits, under which a federal candidate's decision to spend large amounts of personal funds on his own campaign triggered increased limits on contributions to his opponents. See *id.* at 2770-2774. The Court then concluded that, because the accompanying disclosure requirements "were designed to implement the asymmetrical contribution limits" that the Court had invalidated, those requirements "cannot be justified" by any legitimate governmental interest. *Id.* at 2775. Unlike in *Davis*, the disclosure requirements at issue here promote the enforcement of valid substantive provisions of campaign finance law, as the court of appeals correctly recognized. Pet. App. 21-22, 24-25; see p. 15, *supra*. And as *Citizens United* confirms, an informational interest may justify requiring disclosure of the funding for independent expenditures even when the expenditures themselves may not be limited. See 130 S. Ct. at 915.

c. The court of appeals correctly concluded that the government's important informational and enforcement interests extend to the full range of information that SpeechNow will be required to disclose if it becomes a political committee. That disclosure includes information about contributions toward SpeechNow's administrative expenses. As the court of appeals stated (Pet. App. 24), "the public has an interest in knowing who is speaking about a candidate and who is funding that speech, no matter whether the contributions were made towards administrative expenses or independent expenditures."

In *MCFL*, the Court struck down political-committee reporting and registration requirements for certain issue-oriented organizations that only "occasionally make independent expenditures," *i.e.*, those "whose ma-

jor purpose is not campaign advocacy." 479 U.S. at 252-253, 263. Such groups need only identify each person who contributed more than $200 "for the purpose of furthering an independent expenditure." 2 U.S.C. 434(c)(2)(A)-(C); see p. 3, *supra*. The Court explained, however, that if MCFL's independent campaign spending became its major purpose, MCFL would have to abide by the rules applicable to entities whose "primary objective is to influence political campaigns," that is, political committees. 479 U.S. at 262. Those rules include the organizing, reporting, and administrative obligations that petitioners challenge here.

4. Petitioners also contend (Pet. 4-5, 15-16) that, in the circumstances of this as-applied challenge, the additional reporting and administrative obligations applicable to political committees impose an unconstitutionally excessive burden on SpeechNow. The court of appeals correctly rejected that claim, and its holding—which is specific to organizations that have adopted the particular set of self-imposed restrictions that SpeechNow follows, see Pet. App. 35-36—does not warrant further review.

a. Petitioner Keating is a veteran political activist who leads the flourishing Club for Growth PAC, has worked for other PACs, and put in place the systems for those entities to ensure that their required reports were filed properly with the Commission. FEC Exh. 11, 08-CV-248 Docket entry No. 45-1, at 3-4, 6, 8-9. Keating has stated that he is "sure" that he "can handle" the duties of a treasurer, and that he "[g]enerally" understands the reporting requirements of nonconnected political committees. *Id.* at 46; FEC Exh. 103, 08-CV-248 Docket entry No. 45-8, at 3. Thus, Keating is demonstrably capable of complying with the organizational and

reporting requirements for SpeechNow. His wish to devote more of his "spare time" (Pet. 4) to other activities does not differentiate him from any other person who has obligations under FECA, much less convert a constitutionally permissible obligation into an unconstitutional one.

b. As the court of appeals concluded, the organizational requirements that petitioners challenge, such as designating a treasurer and retaining records, do not "impose much of an additional burden upon SpeechNow, especially given the relative simplicity with which SpeechNow intends to operate." Pet. App. 23. Keating is already the treasurer of SpeechNow and has direct knowledge of the group's finances and activities. See *id.* at 37-38. The Statement of Organization for SpeechNow, see 2 U.S.C. 433(b), required Keating to furnish such basic information as "the name, address, and type of committee" (here, a nonconnected committee); "the name, address, and position of the custodian of books and accounts of the committee" (Keating); "the name and address of the treasurer of the committee" (Keating); and "a listing of all banks, safety deposit boxes, or other depositories used by the committee." 2 U.S.C. 433(b)(1), (3), (4) and (6). Keating recently filed the Statement of Organization registering SpeechNow as a political committee, see p. 9, *supra*, which further confirms the absence of any reason to suppose that supplying this information will be unduly burdensome.

c. The court of appeals also correctly concluded that, "[b]ecause SpeechNow intends only to make independent expenditures, the additional reporting requirements that the FEC would impose on SpeechNow if it

were a political committee are minimal." Pet. App. 23.[7] The independent-expenditure disclosures by SpeechNow would include some of the same information that political committees must report. See *id.* at 22-23. And because SpeechNow is not a political party committee and intends to engage in limited activities, Keating would not have to fill out the majority of the schedules about which petitioners complain (Pet. 4-5).[8]

d. Petitioners suggest that the cost of complying with the requirements for political committees is sufficiently high to chill election-related speech. Pet. 28. Although petitioners brought an as-applied challenge, they offered no evidence that SpeechNow will be unable to afford to take the steps necessary to comply with the challenged FECA requirements. See Pet. App. 23-24 (noting that SpeechNow already expected over $120,000 in planned contributions).[9] Instead, they cite

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[7] Because SpeechNow was, until recently, registered as a Section 527 organization under the Internal Revenue Code (Pet. App. 34), Keating was already required to keep detailed financial records and file periodic financial reports to comply with IRS requirements. See Pet. 6 (acknowledging that SpeechNow "must * * * report certain information to the IRS"). Because SpeechNow is now registered with the FEC as a political committee, Keating is no longer required to file periodic financial reports with the IRS. See 26 U.S.C. 527(i)(6).

[8] For instance, petitioners are incorrect in arguing (Pet. 4-5) that Keating will have to disclose the fair market value of the portion of his home used for SpeechNow's purposes. Keating volunteers his services to SpeechNow without pay (Pet. App. 272), and he does not thereby make a reportable contribution. See 2 U.S.C. 431(8)(B); 11 C.F.R. 100.74; see also 11 C.F.R. 100.94 (engaging in Internet activities and using computers, software, and other equipment at home not considered contributions).

[9] Petitioners plan initially to contribute a total of $121,700 to SpeechNow and, as of August 2008, had identified 75 other individuals

a political-science article as support for the proposition that "PACs spend approximately half of their total revenues on compliance costs and fundraising." Pet. 28 (citing Stephen D. Ansolabehere et al., *Why Is There So Little Money in American Politics?*, J. Econ. Persp., Winter 2003, at 105, 108 (Ansolabehere)). That is an inaccurate characterization of the cited article, which simply refers to "fundraising and other expenses" without indicating what percentage is attributable to fundraising or breaking down "other expenses" into categories. Ansolabehere 108. The article thus provides no figures for compliance costs as distinguished from, for example, rent or candidate research costs. A recent survey of the political-committees of leading *Fortune* 100 companies shows that reporting and compliance responsibilities in fact account for only 15% of political-committee staff time on average, and that roughly 80% of the political committees surveyed have two or fewer employees. See PAC Outsourcing, LLC, News Items (Apr. 21, 2010), www.pacout.com/news_full. php?ID=39.

5. Finally, petitioners (Pet. 29-39) and their amici (Br. 25-28) contend that the "major purpose" test for political-committee status should be clarified or abandoned. That contention is not properly presented in this case. In the proceedings below, petitioners did not dispute that SpeechNow would qualify as a political committee under the existing "major purpose" test once it

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who have indicated that they wish to contribute. See Pet. App. 24, 38-39, 41; see also *id.* at 23-24 (en banc court rejected SpeechNow's contention that it cannot comply with the reporting requirements until it knows if it will have enough money to spend, explaining that "[t]his is a specious interpretation of the facts" since SpeechNow already had more than $120,000 in planned contributions from petitioners and dozens more individuals waiting to donate).

met the $1000 contribution threshold. The court of appeals accordingly did not address the question.[10]

In any event, petitioners identify no sound reason for this Court now to reconsider the "major purpose" element of the statutory definition that the Court adopted in *Buckley*, see 424 U.S. at 79, and that the FEC, the lower courts, and regulated parties have relied upon for more than three decades. Petitioners criticize the test for "replac[ing] the strict scrutiny" standard (Pet. 36), but the "major purpose" test is not a standard of review. Instead, it is a constitutionally based narrowing construction of the FECA definition of "political committee."

Petitioners also contend that a group's major purpose to support or oppose a candidate is a necessary, but not a sufficient condition under the Constitution for the group's becoming a political committee. Pet. 31, 34. But this Court in *Buckley* nowhere suggested that any additional condition, beyond the one the Court itself eluci-

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[10] Petitioners cite (Pet. 28 n.6) two FEC advisory opinions as support for their claim that the court of appeals' opinion has caused confusion that this Court should now "clarify." But as noted above, that decision did not discuss, much less alter, the criteria for determining an organization's "major purpose." In any event, the entities that requested those advisory opinions did not question, as petitioners do, whether FECA's political-committee organizational, reporting, and disclosure requirements would apply to them. Rather, the requesters primarily inquired whether they may solicit and accept unlimited contributions, as SpeechNow now can, in light of the court of appeals' holding in this case concerning the application of FECA's contribution limits. See p. 7, *supra*. Indeed, both advisory-opinion requests stated that the entities in question would file regular reports in compliance with the requirements for political committees. FEC Advisory Op. 2010-11, 2010 WL 3184269 (July 22, 2010); FEC Advisory Op. 2010-09, 2010 WL 3184267 (July 22, 2010).

dated, would be needed to make the statutory definition of "political committee" constitutional. In particular, contrary to petitioners' assertion (Pet. 30), the Court did not hold that posing "a threat of corruption" rather than having the major purpose of electoral advocacy is the "constitutional touchstone" for determining whether a group is a political committee. See 424 U.S. at 79-81; pp. 14-15, *supra* (explaining this Court's repeated holdings that important interests other than the anticorruption interest may justify disclosure requirements).

Petitioners also offer an interpretation of the "major purpose" test that no court has endorsed and that petitioners did not urge below. Noting this Court's references to groups "under the control of *a* candidate" or whose major purpose is "the nomination or election of *a* candidate," *Buckley*, 424 U.S. at 79 (emphases added), petitioners suggest (Pet. 33) that the term "political committee" is limited to groups dedicated to the election or defeat of a single specific candidate, and does not encompass groups that support or oppose a larger class of candidates. The Court introduced the "major purpose" test, however, not to exclude from "political committee" status groups that support or oppose multiple federal candidates, but to protect the First Amendment rights of "groups engaged purely in issue discussion." 424 U.S. at 79.

In *MCFL*, the Court considered a newsletter that advocated the election of a number of candidates. 479 U.S. at 243-244. The Court stated that, if MCFL's "campaign activity" became the organization's major purpose, MCFL would "automatically" be treated as a political committee. *Id.* at 262. That analysis indicates that an exclusive organizational focus on a single candidate is not a prerequisite to "political committee" status.

Petitioners' interpretation also cannot be reconciled with FECA's recognition of multicandidate political committees, see 2 U.S.C. 441a(a)(2) and (4); indeed, under petitioners' theory, the term "multicandidate political committee" would be an oxymoron.

Petitioners also object (Pet. 37-38) to the manner in which the FEC makes major-purpose determinations. When confronted with rulemaking petitions asking that the Commission classify nearly all Section 527 organizations as political committees, the Commission decided, as a matter of discretion, to implement the "major purpose" test on a case-by-case basis instead of by rulemaking. See Political Committee Status, Supplemental Explanation and Justification, 72 Fed. Reg. 5595 (2007); see also, *e.g.*, *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual * * * litigation is one that lies primarily in the informed discretion of the administrative agency."); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 292-295 (1974). The Commission's decision was upheld in *Shays* v. *FEC*, 511 F. Supp. 2d 19 (D.D.C. 2007); accord *The Real Truth About Obama, Inc.* v. *FEC*, 575 F.3d 342, 350-351 (4th Cir. 2009) (refusing to preliminarily enjoin, *inter alia*, the FEC's case-by-case approach to the "major purpose" test), vacated on other grounds, 130 S. Ct. 2371 (2010). The Commission had explained that no general rule would produce the correct result in all cases, but that a case-by-case approach provided the flexibility necessary to take into account the individual characteristics of a group. *Shays*, 511 F. Supp. 2d at 30; 72 Fed. Reg. at 5597, 5599, 5601-5602.

Petitioners do not identify any administrative decision in which they believe that the FEC misidentified a particular group's "major purpose." And, contrary to

the contentions of petitioners and their amici, the FEC can discern a group's "major purpose" without conducting "a profoundly burdensome inquiry into every aspect of a group's activities." Pet. 35; see Committee for Truth in Politics Amicus Br. 26-27. Sources such as the group's public statements, fundraising appeals, disclosure reports, charters, or bylaws usually provide the relevant facts. See 72 Fed. Reg. at 5601, 5605 (describing sources the Commission considers in its "major purpose" analysis). In any event, because making independent expenditures appears to be SpeechNow's *sole* purpose, whatever difficulties of administration the "major purpose" test might cause in its application to other organizations (see Pet. 37-38) are not present here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SPEECHNOW.ORG, *et al.*,

Petitioners,

v.

FEDERAL ELECTION COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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ARGUMENT

The central question presented by the petition in this case is whether the D.C. Circuit's decision requiring SpeechNow.org to become a PAC merely to make independent expenditures can be squared with this Court's precedents. Petitioners made clear in their petition that it cannot be, for two key reasons. First, as this Court held in *Citizens United v. FEC*, the obligations of PACs – the same obligations that apply to SpeechNow.org – impose significant burdens on speech. *See* Pet. at 10. Second, that burden can be justified only by the government's interest in combating corruption. *Id.* at 13. SpeechNow.org unquestionably poses no threat of corruption because, like Citizens United, it will only make independent expenditures. Moreover, SpeechNow.org will satisfy the interest in disclosure by complying with disclosure provisions nearly identical to those upheld in *Citizens United*. *See* Pet. at 3; App. 22. It follows that SpeechNow.org cannot be required to comply with the PAC burdens that this Court struck down in *Citizens United* unless there is some constitutionally significant difference between the corporations at issue in *Citizens United* and groups like SpeechNow.org.

The D.C. Circuit found no such difference. Indeed, it recognized the obvious applicability of *Citizens United* to this case in striking down the contribution limits that accompanied SpeechNow.org's designation as a PAC. *See* App. 20. But when it came to the remaining provisions of PAC status that applied to SpeechNow.org, the D.C. Circuit inexplicably upheld

them as mere "disclosure" laws despite this Court's conclusion in *Citizens United* that they burden speech. *See id.* Indeed, the D.C. Circuit did essentially what this Court refused to do in *Citizens United*: It carved up the restrictions that apply to groups that must become PACs in order to make independent expenditures, excising the contribution limits but leaving in place the remaining burdens of PAC status. *Cf. Citizens United v. FEC*, 130 S. Ct. 876, 891-92 (2010) (refusing to carve out a narrow exception to § 441b for certain corporations). The result will inevitably be what this Court sought to avoid in *Citizens United* – a slew of new rules, legal tests, and litigation to determine who must endure burdensome PAC regulations in order to speak and who may speak freely.[1]

The government has now made clear that this is precisely what will happen as a result of the D.C. Circuit's decision. According to the government, not only must SpeechNow.org become a PAC in order to make independent expenditures, but *any* group – "incorporated and unincorporated alike" – must do so if it has the "major purpose" of making independent expenditures. *See* Resp. Br. at I (question presented), 21-23. As a result, groups that only occasionally make

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[1] Since the D.C. Circuit's decision, a district court in Minnesota has held that, to make independent expenditures, corporations must either create what amounts to a PAC under state law or contribute to other PACs. *See Minn. Citizens Concerned for Life, Inc. v. Swanson*, Civ. No. 10-2938, 2010 U.S. Dist. LEXIS 98498, at *21-29 (D. Minn. Sept. 20, 2010).

independent expenditures need not become PACs and may disclose their independent expenditures and the contributions that fund them under §§ 434(c) and 441d. *Id.* at 17. However, groups like SpeechNow.org that wish to spend the majority of their funds on independent speech must comply not only with those disclosure provisions, but with the registration, organizational, and reporting obligations for PACs as well. *See id.* at 15-16.

The government attempts to justify this position by arguing that *Citizens United* involved entirely different statutory provisions and thus has no bearing on whether any group, corporate or otherwise, must become a PAC under the provisions that apply to SpeechNow.org. *Id.* at 12-13. But this is a distinction without a difference, in that the law treated groups like SpeechNow.org substantially similarly to corporations prior to *Citizens United*. Under § 441b, corporations were prohibited from making independent expenditures themselves, but were permitted to make them through PACs that were subject to source and amount limits on funds and the other obligations of PACs. *See* 2 U.S.C. § 441b(a), (b)(2)(C). Although there is no outright prohibition on unincorporated groups making independent expenditures, SpeechNow.org is defined as a PAC because it intends to raise or spend more than $1,000 and has a "major purpose" of making independent expenditures. *See* App. 55 (2 U.S.C. § 431(4)); App. 224 (FEC Draft Advisory Opinion). Thus, groups like SpeechNow.org faced the same alternative as corporations – refrain

from making independent expenditures or make them through PACs that are subject to funding limits and the other obligations that applied to PACs. This Court held in *Citizens United* that the government could not impose such a choice on corporations. The same principle should apply here.

The government also contends that the Court in *Citizens United* struck down the PAC requirement for corporations because PACs are separate entities. Resp. Br. at 12-13. But that was only one of two grounds on which the Court concluded that PACs were inadequate alternatives to the ban on independent expenditures. As the Court in *Citizens United* stated, "[e]ven if a PAC could somehow allow a corporation to speak – and it does not – the option to form PACs does not alleviate the First Amendment problems with § 441b" because PACs are burdensome. 130 S. Ct. at 897. The Court specifically listed the registration, organizational, and disclosure provisions for PACs as burdensome, and it relied on a portion of the plurality opinion in *MCFL* that focused almost entirely on those same requirements. *Id.* (citing *McConnell v. FEC*, 540 U.S. 93, 330-32 (2004) (Kennedy, J., dissenting in part) (quoting *FEC v. Mass. Citizens for Life, Inc.* (*MCFL*), 479 U.S. 238, 253-54 (1986) (plurality opinion))). The clear conclusion is that the registration, organizational, and disclosure provisions for PACs – that is, the provisions that apply to SpeechNow.org – impose significant burdens on speech as a matter of law. That is true whether a

group is a corporation or an unincorporated association.

Ultimately, the only salient difference between SpeechNow.org and the corporations at issue in *Citizens United* is the percentage of their budgets they will devote to political speech. SpeechNow.org will devote most of its funds to independent expenditures, so it must become a PAC. Groups like Citizens United, which only occasionally engage in independent speech, need not do so.

The government contends that this is justified because PAC burdens are mere "disclosure" laws. Resp. Br. at 10-11. This is wrong, as Petitioners have made clear, Pet. at 14-21, but regardless of the label or even the level of scrutiny one applies to PAC burdens, the fact remains that no constitutional principle permits the government to impose greater burdens on speakers simply because they decide to devote more resources to protected speech.

Buckley does not support this proposition. As the government admits, the Court in *Buckley* used "major purpose" as a narrowing construction to limit the reach of PAC status in order to avoid vagueness and overbreadth. Resp. Br. at 22. But as *Buckley* itself shows, even laws that are not vague or overbroad can still be unconstitutional. *See Buckley v. Valeo*, 424 U.S. 1, 44-51 (1976); *see also* Pet. at 33-34.

MCFL does not support the government's position. *MCFL* held that the government cannot bar nonprofit corporations that posed no concerns about

corruption from making independent expenditures. *MCFL*, 479 U.S. at 263. The "major purpose" dicta at the end of *MCFL* simply cannot be transformed into a holding that protected speech is subject to burdensome regulations because a party engages in too much of it. This Court rejected that basic premise in *Citizens United* in overturning *Austin v. Michigan Chamber of Commerce*. *See* 130 S. Ct. at 913. Indeed, the Court even noted that the *MCFL* Court had erroneously relied on the "corporate distortion" rationale in discussing § 441b. *See id.* at 883, 912. The *MCFL* dicta can thus be seen as consistent with this erroneous view, in that it implies that the more of its budget a group spends on speech, the more it can be regulated. *See MCFL*, 479 U.S. at 262. That dicta thus cannot justify the government's position.

Finally, *Citizens United* provides no support for the government's position. Nowhere in that decision did this Court even hint that PACs are burdensome only for groups that make only occasional independent expenditures. Indeed, this Court rejected an argument in *Citizens United* that is very similar to the result the government supports in this case. As an alternative to striking down § 441b, the government urged the Court to carve out an exception to the statute for certain nonprofits that would allow them to operate under the Snowe-Jeffords Amendment. 130 S. Ct. at 891. Under that approach, those nonprofits would avoid § 441b's expenditure ban if they only accepted individual donations and maintained those funds in a separate segregated account. *Id.* Here, the

government grudgingly accepts that SpeechNow.org prevailed on its challenge to contribution limits below, yet it contends that in order to make unlimited independent expenditures, SpeechNow.org will have to become a PAC – a far more burdensome option than the segregated account under Snowe-Jeffords. *Compare* 2 U.S.C. § 441b(c)(2)-(3) *with* App. 72-93 (2 U.S.C. §§ 432-434(a)). In *Citizens United*, the Court rejected that approach not only because it would require a tortured interpretation of the statute, but also because it would "require case-by-case determinations" and would chill "archetypical political speech." 130 S. Ct. at 892. This Court should reject the government's and the D.C. Circuit's approach here for the same reason.

The government's claim that PAC burdens are mere disclosure laws, *see* Resp. Br. at 11-12, does not rejuvenate its otherwise unsupportable position. First, that claim is factually incorrect, as the burdens that apply to PACs go well beyond disclosure. *See Citizens United*, 130 S. Ct. at 897-98. In any event, this Court has never held that the government has an interest in requiring the disclosure of every aspect of a group's operations – to say nothing of requiring it to appoint a treasurer, keep all records for three years, open a separate bank account, and comply with a host of other regulations – simply because it wishes to engage in independent political speech. *Cf. NAACP v. Ala. ex rel. Flowers*, 377 U.S. 288, 307-08 (1964) (preventing Alabama from obtaining a civil rights group's membership list in order to protect rights of

association). Indeed, in *Citizens United*, *McConnell*, and *Buckley*, the Court held that disclosure laws nearly identical to those with which SpeechNow.org will comply provided voters with all the information they need about those who engage in independent political speech. *See Citizens United*, 130 S. Ct. at 916; *McConnell*, 540 U.S. at 196-97; *Buckley*, 424 U.S. at 68. Neither the government nor the D.C. Circuit cited any case that would justify imposing more comprehensive and burdensome disclosure laws on speakers simply because they spend more of their money on protected speech.[2]

Thus, even under intermediate scrutiny, the government's and the D.C. Circuit's position would fail. While intermediate scrutiny is less rigorous than strict scrutiny, the government still must show a substantial relationship between the law and its interest and that its interest justifies the burden the law imposes. *See Citizens United*, 130 S. Ct. at 914; *Davis v. FEC*, 128 S. Ct. 2759, 2774-75 (2008). Yet applying disclosure laws – especially as part of the burdensome regulatory scheme for PACs – based *solely* on a group's major purpose of making independent expenditures makes no sense for several reasons.

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[2] The government claims that the FEC and the regulated community have come to rely on the major purpose test. *See* Resp. Br. at 22. However, "reliance interests are important considerations in property and contract cases," but they do not justify restrictions on speech. *Citizens United*, 130 S. Ct. at 913.

First, neither the government nor the public has an interest in knowing more about a group simply because the group devotes more of its resources to independent speech, and the government cites no case to the contrary. Indeed, under the government's approach, smaller groups would be much more likely to be subjected to more comprehensive and burdensome regulations than larger groups, because the costs of any given independent expenditure will necessarily comprise a larger portion of their budgets. *Cf. Citizens United*, 130 S. Ct. at 907-08 (noting that the effect of § 441b is often to prevent smaller and nonprofit corporations from having the same voice in politics as their larger competitors).

Second, the government's and D.C. Circuit's concern that groups that do not report as PACs may "hide" contributions for administrative expenses, *see* Resp. Br. at 17, would apply to any group, whether or not it had a major purpose of making independent expenditures. Donations earmarked for administrative expenses would be just as beneficial to groups with a major purpose as to those without one, so tying disclosure to major purpose is nonsensical.

The same point applies to the government's claim that without PAC reporting, it will not be able to keep track of whether groups that make independent expenditures violate contribution limits or accept contributions from foreign nationals. Resp. Br. at 15. This is equally true whether the group makes a lot of independent expenditures or only a few. Indeed, because SpeechNow.org does not make direct contributions,

there is no reason to single it out as more likely to violate contribution limits than any citizen or group who speaks out about any topic. *Cf. Buckley*, 424 U.S. at 80-81 (holding that independent-expenditure disclosure is not designed to facilitate enforcement of contribution limits). In any event, making contributions above the limits and accepting contributions from foreign nationals are already illegal. *See* 2 U.S.C. §§ 441a(f), 441e(a)(2). Even so, if for some reason SpeechNow.org were to accept a contribution of more than $200 from a foreign national for its independent expenditures, it would still have to disclose that contribution under § 434(c).

At bottom, in the government's view, groups that spend too high a percentage of their funds on independent speech – no matter how small in absolute dollars – are inherently suspicious and thus properly subjected to far-reaching regulation of all their operations. But, as demonstrated above, this view is fundamentally irrational, and it finds no support in this Court's precedents. *Cf. Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488 (1995) (invalidating speech regulation under intermediate scrutiny "because of the overall irrationality" of the regulatory scheme).

The government also claims, as did the D.C. Circuit, that becoming a PAC would not be much of a burden on David Keating. Resp. Br. at 19-20. Even if this were true, however, it would be irrelevant, because *Citizens United* held that PACs are burdensome as a matter of law. *See* 130 S. Ct. at 894 (stating that it would decide claims facially). Neither the

government nor the lower courts are entitled to decide that PAC regulations are not too burdensome in a particular case, any more than they may decide that independent expenditures sometimes do pose a threat of corruption or that some candidates can be subjected to expenditure limits. As this Court held in *Citizens United*, "[c]ourts, too, are bound by the First Amendment" and may not "draw, and then redraw, constitutional lines" based on the particular speaker or medium of expression. 130 S. Ct. at 891.

The PAC requirements to which this Court referred in *Citizens United* are just as burdensome for SpeechNow.org as they would have been for Citizens United. Indeed, all of the burdens that this Court listed in *Citizens United* will apply to SpeechNow.org.[3] And even if David Keating can "handle" those burdens without being completely silenced, Mr. Keating may not always be available to serve as SpeechNow.org's treasurer, a position for which he receives no compensation.[4] The government simply ignores the reality

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[3] The government correctly notes that, at present, David Keating need not charge SpeechNow.org for the costs of his home, telephone, and Internet because he is currently volunteering his time. *See* 11 C.F.R. § 100.74, .94. That would change, however, if Mr. Keating were one day able to hire others or to be paid himself to operate SpeechNow.org. *See* 11 C.F.R. § 100.52(d)(1). Furthermore, FEC regulations would not exempt costs associated with a fundraiser conducted from Mr. Keating's home. *See* App. 50-51; 11 C.F.R. §§ 100.76-.77.

[4] The government argues that SpeechNow.org's status as a 527 organization shows that the PAC requirements impose little burden on it. *See* Resp. Br. at 20 n.7. But as this Court has

(Continued on following page)

confronted by many groups forced to operate as PACs. *See* Comm. for Truth in Politics Amicus Br. at 9-20; *see also MCFL*, 479 at 255 n.8 (noting that PACs are burdensome for many groups even if not always for any particular group).

Moreover, as this Court noted in *Citizens United*, time is of the essence during elections. *See* 130 S. Ct. at 898. Groups may not be able to get their message out quickly enough if they must first form burdensome PACs. *See id.* Indeed, under the major purpose test – which requires an intensive case-by-case analysis to determine whether a group must become a PAC – many groups will not even know in advance whether they must form PACs in order to speak. *See* Supplemental Explanation & Justification, 72 Fed. Reg. 5595, 5601-02 (Feb. 7, 2007). The uncertainty and burden of a process such as this will surely chill speech. *See Citizens United*, 130 S. Ct. at 892.

CONCLUSION

The D.C. Circuit's decision conflicts with *Citizens United* and *Buckley* and finds no support in this Court's other precedents. The government's defense of that decision shows precisely how the decision will undermine *Citizens United* and the principles on which it was based. This case thus involves both a

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noted, a group's tax status has no bearing on the FEC's authority to regulate it. *See MCFL*, 479 U.S. at 256 n.9.

direct conflict with this Court's decisions and a matter of national importance that justifies this Court's review.

Respectfully submitted,

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SPEECHNOW.ORG, *et al.*,

Petitioners,

v.

FEDERAL ELECTION COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF *AMICI CURIAE* OF COMMITTEE FOR TRUTH IN POLITICS AND THE COMMONWEALTH FOUNDATION FOR PUBLIC POLICY ALTERNATIVES IN SUPPORT OF PETITIONERS

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Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) 13

Buckley v. Valeo, 424 U.S. 1 (1976) 2, 5

Citizens United, Inc. v. Federal Election Commission, 130 S. Ct. 876 (2010) ..... *passim*

Federal Election Commission v. Akins, 524 U.S. 11 (1998) 5

Federal Election Commission v. Machinists Non-Partisan Political League, 655 F.2d 380 (D.C. Cir. 1981) 26

Federal Election Commission v. Massachusetts Citizens for Life, 479 U.S. 238 (1986) ..... *passim*

Federal Election Commission v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652 (2007) 5

McConnell v. Federal Election Commission, 540 U.S. 93 (2003) 7, 8

National Organization For Marriage v. McKee, 2010 U.S. Dist. LEXIS 85725 (D. Me. Aug. 19, 2010) 4

National Organization For Marriage v. McKee, 666 F. Supp. 2d 193 (D. Me. 2009) 3

Nike, Inc. v. Kasky, 539 U.S. 654 (2003) 20

Sweezy v. New Hampshire, 354 U.S. 234 (1957) 26

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CONSTITUTION, STATUTES, REGULATIONS & RULES

2 U.S.C. 432 6
2 U.S.C. 432(a) 6, 10
2 U.S.C. 432(b)(2) 6
2 U.S.C. 432(c) 6
2 U.S.C. 432(d) 6
2 U.S.C. 433 6
2 U.S.C. 433(a) 6
2 U.S.C. 433(b) 6
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2 U.S.C. 434 6
2 U.S.C. 434(a)(4)(A) 7
2 U.S.C. 434(a)(4)(B) 7
2 U.S.C. 434(b) 7
2 U.S.C. 437f(b) 25
2 U.S.C. 437f(c)(1)(B) 25
11 C.F.R. 104.18(a)(i) 16
11 C.F.R. 104.18(a)(ii) 16

OTHER AUTHORITIES

Agency Policies and Procedures, 73 Fed. Reg. 74494 (Dec. 8, 2008) 14

TABLE OF AUTHORITIES – Continued

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Bipartisan Commission on the Political Reform Act of 1974, *Overly Complex and Unduly Burdensome: The Critical Need to Simplify the Political Reform Act* <http://www.fppc.ca.gov/pdf/McPherson.pdf>.....12, 13, 18, 24

Comment of Birkenstock and Cline in Response to SEC File #S7-18-09, Political Contributions by Certain Investment Advisers (Oct. 9, 2009) <http://www.sec.gov/comments/s7-18-09/s71809-227.pdf>.....11

Comment of Diane Valentino, Agency Procedures and Processes (Dec. 12, 2008) <http://www.fec.gov/law/policy/enforcement/2009/comments/comm29.pdf>.....14

Comment of Gloria Bram, Agency Procedures and Processes (Feb. 11, 2009) <http://www.fec gov/law/policy/enforcement/2009/comments/bram.pdf>.....12, 17

Comment of Jan Baran, FEC Agency Procedures (Jan. 5, 2009) <http://www.fec.gov/law/policy/enforcement/2009/comments/comm33.pdf>.....19

Comment of Jason Eugene Call, Agency Procedures and Processes (Dec. 17, 2008) <http://www.fec.gov/law/policy/enforcement/2009/comments/comm30.pdf>.....14

TABLE OF AUTHORITIES – Continued

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Comment of Peter d'Errico, Agency Procedures and Processes (Dec. 19, 2009) <http://www.fec.gov/law/policy/enforcement/2009/comments/comm14.pdf> 17

Committee Treasurers Brochure, <http://www.fec.gov/pages/brochures/committee_treasurers_brochure.pdf> .....

FEC Internal Controls and Political Committees, <http://www.fec.gov/law/policy/guidance/internal_controls_polcmtes_07.pdf> 11

FEC, Political Committee Status, 72 Fed. Reg. 5595 (Feb. 7, 2007) 28

FEC Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 3 (Jan. 3, 2005) <http://www.fec.gov/law/policy/2004/notice2004-20.pdf> 12

http://eqs.nictusa.com/eqs/searcheqs 16

http://saos.nictusa.com/saos/searchao 15, 25

Interview by Jim Lehrer of Randy Tate, *Campaigns Under Scrutiny – Opposing Reform*, NewsHour (Sept. 30, 1997) <www.pbs.org/newshour/campaign/september97/hearing_9-30.html> 13

TABLE OF AUTHORITIES – Continued

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Jeffrey Milyo, Ph.D., *Campaign Finance Red Tape: Strangling Free Speech & Political Debate*, Institute for Justice (Oct. 2007) <www.ij.org/publications/other/campaign-finance-red-tape.html> 17, 18, 22, 23

Robert Bauer, More Soft Money Hard Law (Feb. 1, 2007) <http://www.moresoftmoneyhardlaw.com/news.html?AID=920> 27

Statement for the Record of Commissioner Smith, FEC MUR 4624 (Nov. 6, 2001) <http://eqs.nictusa.com/eqsdocs /0000018E.pdf> 27

Statement of Reasons of Commissioners Petersen, Hunter and McGahn II, FEC MURS 5957, 6031 <http://eqs.nictusa.com/eqsdocs/29044243959.pdf> 23

Statement of Reasons of Commissioners Petersen, Hunter and McGahn II, FEC MUR 6005 <http://eqs.nictusa.com/eqsdocs/29044234461.pdf> 23, 24

Testimony of Jan Baran, FEC Public Hearing on Agency Practices and Procedures (Jan. 14, 2009) <http://www.fec.gov/law/policy/enforcement/2009/01141509hearingtranscript.pdf> 26

Testimony of Marc Elias, FEC Public Hearing on Agency Practices and Procedures (Jan. 14, 2009) <http://www.fec.gov/law/policy/enforcement/2009/01141509hearingtranscript.pdf> 19, 20

www.fec.gov/audits/audit_reports_auth.shtml 16

www.fec.gov/general /library.shtml 16

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www.fec.gov/law/cfr/11_cfr.pdf 15

www.fec.gov/law/cfr/ej_main.shtml 15

www.fec.gov/law/feca/feca.pdf 15

www.fec.gov/law/litigationalpha.shtml 16

INTEREST OF *AMICI CURIAE*[1]

The Committee for Truth in Politics is a non-profit organization that is deeply concerned about associational privacy and the effect of unconstitutional campaign finance laws on the political process. Its interest is in safeguarding associations' First Amendment rights from the ever-increasing expansion of unconstitutional burdens imposed by the government.

The Commonwealth Foundation for Public Policy Alternatives is an independent, non-profit research and educational institute that develops and advances public policies on the nation's founding principles of limited constitutional government, economic freedom, and personal responsibility for one's actions. It is concerned about governments' impositions of burdensome regulatory schemes on First Amendment rights.

SUMMARY OF ARGUMENT

At issue in this case is whether the government can impose the burdens of political action committee ("PAC") status on associations of citizens whose

[1] The parties have consented to the filing of this brief *amici curiae*, as indicated by letters of consent filed with the Office of the Clerk of this Court. Counsel of record for all parties have been given at least 10 days notice of *amici curiae*'s intention to file. This brief was not authored, in whole or in part, by any counsel for any party. No person or entity, other than the *amici*, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

speech is non-corrupting. The lower court held that the PAC organizational and reporting requirements found burdensome in Supreme Court precedents imposed little additional burden on SpeechNow, because it had already agreed to comply with significantly less burdensome expenditure-specific disclosure requirements. Such a finding in effect equates PACs with other citizen groups who do not possess the same attributes that warrant extensive regulation of PACs. Also, it mistakenly views the burdens of this invasive regime as of the same kind as the less burdensome requirements for simple expenditure-specific disclosure.

PAC status places an association into a comprehensive regulatory scheme, which has been found burdensome in and of itself, and as applied to certain associations. This Court has repeatedly recognized the burdens of PAC status, and these burdens have been borne out by the experience of associations. In light of this, the Court should review the lower court's ruling that imposes PAC status on independent expenditure groups whose speech is non-corrupting, and for which there is no compelling government interest in burdening.

The Court's guidance on this issue of national importance is urgently needed now. The burdens under which PACs operate have only increased in the years since *Buckley v. Valeo*, 424 U.S. 1 (1976). Government-imposed monetary and other costs of participation in the political process – the expert

accountants, lawyers, paid advisors and staff – effectively restrains speech.

The current PAC regulatory scheme imposes too great a burden because it permits few to speak freely, other than the elite who have the time and resources to ensure they will not be investigated, fined or found inadvertently out of compliance with the law.

Allowing the lower court's decision to stand effectively takes away the free speech rights safeguarded by *Citizens United v. FEC*, 130 S. Ct. 876 (2010). The result will be that citizens who can't afford the monetary and time commitments required under the PAC regulatory scheme will not be able to exercise their First Amendment rights.

ARGUMENT

This case is of utmost importance to associations of citizens across the country because there are very real and burdensome consequences if PAC status is imposed on them. Campaign finance regulation has become so complex and confusing that ordinary citizens cannot understand it, and even experts struggle with it. Professionals must be hired before one speaks to handle the heavy workload, help maneuver through the complex web of restrictions, and help avoid the imposition of penalties. The PAC regulatory regime imposes a greater burden on the speech of small associations. *See National Organization For Marriage v. McKee*, 666 F. Supp. 2d 193, 206

(D. Me. 2009) ("Regulation tends to grow and to develop requirements appropriate for large organizations . . . and to ignore the burdensome effects on the speech of individuals and small organizations."). Small citizen groups, *including those whose speech is non-corrupting*, are chilled from speaking because they want to avoid the complexity altogether or because they cannot afford a team of specialists. The Court's review is needed to prevent immediate and nationwide suppression of speech on important public policy matters. Indeed, the lower court's holding that PAC burdens are minimal has already been cited approvingly. *See National Organization For Marriage v. McKee*, 2010 U.S. Dist. LEXIS 85725 at *45-46 (D. Me. Aug. 19, 2010) (citing *SpeechNow*'s finding that organizational PAC requirements are "only a minimal added burden").

I. The Lower Court's Holding That The Government, Consistent With The First Amendment, May Require Associations Of Citizens To Register And Report As PACs In Order To Make Unlimited Independent Expenditures Conflicts With Supreme Court Precedent.

"PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations." *Citizens United*, 130 S. Ct. at 897. While the lower court understood disclosure can be burdensome, App. 20, it entirely missed that PAC burdens are not judged as mere disclosure laws.

A. PAC registration and reporting requirements are burdensome as a matter of law.

The burdens associated with PAC status were first noted in *Buckley*. The Court was concerned not only with the chilling effect of reporting and disclosure requirements on an organization's contributors, but also with the potential burden of disclosure requirements on an association's own speech. *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 265-66 (1986) (O'Connor, J., concurring) (*MCFL*) (*citing Buckley*, 424 U.S. at 66-68, 74-82). Since *Buckley*, the Court has repeatedly recognized, both generally and specifically, the burdens imposed by PAC status, especially on small associations. "Detailed record-keeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear." *MCFL*, 479 U.S. at 253; *see also FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2671 n.9 (2007) (*citing MCFL*, 479 U.S. at 253-255 (plurality opinion)) ("PACs impose well-documented and onerous burdens, particularly on small nonprofits."); *FEC v. Akins*, 524 U.S. 11, 14-15 (1998) ("[T]he Act imposes extensive recordkeeping and disclosure requirements upon groups that fall within the Act's definition of 'political committee.' Those groups must . . . file complex FEC reports. . . ."). Most recently, the Court held that "PACs are burdensome alternatives; they are expensive to

administer and subject to extensive regulations." *Citizens United*, 130 S. Ct. at 897.

In *MCFL*, the Court provided a detailed description of the burdens of PAC status imposed by operation of the statute:

> Under § 432, [a PAC] must appoint a treasurer, § 432(a); ensure that contributions are forwarded to the treasurer within 10 or 30 days of receipt, depending on the amount of contribution, § 432(b)(2); see that its treasurer keeps an account of every contribution regardless of amount, the name and address of any person who makes a contribution in excess of $50, all contributions received from political committees, and the name and address of any person to whom a disbursement is made regardless of amount, § 432(c); and preserve receipts for all disbursements over $200 and all records for three years, §§ 432(c), (d). Under § 433, [a political committee] must file a statement of organization containing its name, address, the name of its custodian of records, and its banks, safety deposit boxes, or other depositories, §§ 433(a), (b); must report any change in the above information within 10 days, § 433(c); and may dissolve only upon filing a written statement that it will no longer receive any contributions nor make disbursements, and that it has no outstanding debts or obligations, § 433(d)(1).
>
> Under § 434, [a political committee] must file either monthly reports with the FEC or

> reports on the following schedule: quarterly reports during election years, a pre-election report within 30 days after an election, and reports every 6 months during nonelection years, §§ 434(a)(4)(A), (B). These reports must contain information regarding the amount of cash on hand; the total amount of receipts, detailed by 10 different categories; the identification of each political committee and candidate's authorized or affiliated committee making contributions, and any persons making loans, providing rebates, refunds, dividends, or interest or any other offset to operating expenditures in an aggregate amount over $200; the total amount of all disbursements, detailed by 12 different categories; the names of all authorized or affiliated committees to whom expenditures aggregating over $200 have been made; persons to whom loan repayments or refunds have been made; the total sum of all contributions, operating expenses, outstanding debts and obligations, and the settlement terms of the retirement of any debt or obligation, § 434(b).

MCFL, 479 U.S. at 253-54. The court of appeals ignored these facts and neglected these precedents. It imposed the PAC regulatory regime on SpeechNow based on the government interest justifying *non-PAC* disclosure requirements upheld in *McConnell v. FEC*, 540 U.S. 93, 231-32 (2003) and *Citizens United*, 130 S. Ct. at 914. App. 21-23.

This holding turns *MCFL* on its head. The lower court found that because expenditure-specific disclosure requirements of electioneering communications were upheld by this Court in *McConnell* and *Citizens United*, it was thus constitutional to impose the "full panoply of regulations that accompany status as a political committee" on associations making only independent expenditures because such additional regulations are a minimal additional burden. *MCFL*, 479 U.S. at 262. Such a conclusion is erroneous both as a matter of law and as a matter of fact.

PAC organizational and reporting requirements are not mere expenditure-specific disclosure requirements; operating as a PAC imposes an entirely different and much more burdensome regulatory scheme upon an association. Moreover, the fact that SpeechNow can comply with significantly less burdensome expenditure-specific disclosure requirements does not ipso facto turn the PAC regulatory scheme into a "minimal burden" for SpeechNow. If such were the case, it would have been a minimal burden for MCFL to have operated as a PAC, rather than using expenditure-specific disclosure for its independent expenditures. But this Court did not find that to be the case. *MCFL*, 479 U.S. at 255.

B. The court of appeals' holding conflicts with Supreme Court precedent because it grossly underappreciates the organizational, reporting, and administrative burdens of PAC status.

As the previous section demonstrates, this Court has held as a matter of law that PACs are burdensome. And, in fact, the evidence over the last three decades demonstrates that this holding is incontrovertibly true. The court of appeals thus ignored both relevant holdings of this Court and clear evidence supporting those holdings.

The court of appeals made two determinations regarding PAC burdens. First, the court concluded that organizational requirements do not impose much of a burden in addition to those already imposed by expenditure-specific disclosure requirements. Second, the court concluded that additional PAC reporting requirements are minimal. Both of these determinations are erroneous. In addition, the court of appeals failed even to discuss, let alone recognize the administrative burdens that PAC status imposes.

1. The court of appeals erroneously concluded that "organizational requirements" do not impose much of an additional burden.

From creation to termination, operating a PAC is complex, time consuming, and fraught with opportunity for misstep. In concluding that organizational

requirements do not impose much of an additional burden on citizen groups, the court of appeals erred in two respects.

First, it erroneously concluded that designating a treasurer and retaining records does not impose much of an additional burden. App. 23. Second, the court of appeals failed to recognize that the burdensome organizational requirements imposed by the government on a PAC are the same whether an association chooses to operate relatively simply or with a more complex organizational structure. App. 23. Each of these will be addressed in turn.

The complexity and burdens of organizing as a PAC preclude many organizations from even attempting to participate in the political process. *See MCFL*, 479 U.S. at 255 n.8 (some "may not find it feasible to establish such a committee, and may therefore decide to forgo engaging in independent political speech"). One of the first things a PAC must do is name a treasurer. *See* 2 U.S.C. 432(a) ("No contribution or expenditure shall be accepted or made by or on behalf of a political committee during any period in which the office of treasurer is vacant."). The act of naming a treasurer is easy – it consists of listing the individual's name and address on a form. However, it is often no easy task to find a qualified individual willing to devote the time to serve in the position or to assume the legal liability of doing so.

The days of the volunteer treasurer are over for several reasons. The complexity of the job has all but

required committees to look for individuals with expertise in accounting. A nine-page guidance document published by the Federal Election Commission ("FEC") on implementing internal controls by political committees is but one example of the specialized knowledge a treasurer needs. *See* FEC Internal Controls and Political Committees at 1, 2 <http://www.fec.gov/law/policy/guidance/internal_controls_polcmtes_07.pdf> (emphasis added) ("The responsibility of establishing the necessary control procedures falls to a political committee's treasurer. . . . This guide should not be the only resource that is consulted. *In addition to* accounting professionals, there are numerous resources that can be found on the Internet."). Treasurers are expected to be up to date on the reporting and recordkeeping rules, reconcile the bank account, file FEC reports, IRS returns, and state reports. *See* Comment of Birkenstock and Cline in Response to SEC File #S7-18-09, Political Contributions by Certain Investment Advisers at 3 (Oct. 9, 2009) <http://www.sec.gov/comments/s7-18-09/s71809-227.pdf> ("It is also common for candidates to have treasurers who work in finance or accounting and serve a particularly important role. . . .").

Even for those with experience, recordkeeping imposes significant burdens:

> As a treasurer of a county party, and an accountant for the past 40 years, I thought I was capable of handling the reporting and record keeping requirements for a Congressional candidate. I was wrong and my efforts

> to learn were severely hampered by . . . the unwieldy reporting program.

Comment of Gloria Bram, Agency Procedures and Processes (Feb. 11, 2009) <http://www.fec.gov/law/policy/enforcement/2009/comments/bram.pdf>. One mistake is enough to create discrepancies that are difficult to remedy and can lead to fines. The FEC has confirmed that treasurers may be pursued in their *personal capacities* and thus, be personally liable. Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 3 (Jan. 3, 2005) <http://www.fec.gov/law/policy/2004/notice2004-20.pdf>. An FEC brochure specifically states that "[c]ommittee treasurers may be liable for civil monetary penalties if reports are not filed or are not filed on time." Committee Treasurers Brochure, <http://www.fec.gov/pages/brochures/committee_treasurers brochure.pdf>.

Given all this, it is not hard to see why some organizations have difficulty finding an individual willing and qualified to serve as treasurer. As experts have noted, "The unintended consequence of [complicated laws] is that the price of admission into politics becomes too high. People do not want to become . . . treasurers because of the potential liability." Bipartisan Commission on the Political Reform Act of 1974, *Overly Complex and Unduly Burdensome: The Critical Need to Simplify the Political Reform Act* at 62 (last visited August 18, 2010) <http://www.fppc.ca.gov/pdf/McPherson.pdf> ("Bipartisan Commission").

But working as a treasurer is not the only labor required to operate a PAC. Far from it. In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 708 (1990) (Kennedy, J., dissenting), for example, it was noted that the organization's PAC consumed an estimated twenty-five to fifty percent of its receipts in establishment and administrative expenses. Given this reality, it is becoming a rarity to find a PAC that is able to successfully operate on a small administrative budget using a volunteer staff. The sheer amount of time required, the knowledge of rules, the potential for significant fines for minor missteps, and continuous recordkeeping and reporting requirements necessitate hiring a cadre of professionals.

To comply with the law's requirements, PACs need to hire attorneys, CPAs, and IT professionals, all of which cost money that a new or small PAC does not have. *See* Interview by Jim Lehrer of Randy Tate, *Campaigns Under Scrutiny – Opposing Reform*, NewsHour at ¶14 (Sept. 30, 1997) <www.pbs.org/newshour/campaign/september97/hearing_9-30.html> (Randy Tate stating that "If you've ever set up a political action committee, you need several attorneys, a couple of CPA's, piles of paper work, and it would have a chilling effect on everyday citizens trying to organize their neighborhood to have an impact on their local member of Congress."); Bipartisan Commission at 62 ("Thus the regulations have injured grassroots democracy and have essentially professionalized politics so that you have to have lawyers and accountants on your campaign staff.").

In January 2009, the FEC sought public comment on its policies and procedures. Agency Policies and Procedures, 73 Fed. Reg. 74494, 74495 (Dec. 8, 2008). In response, the FEC received comments from several individuals highlighting the organizational burdens placed on volunteer-driven PACs:

> This whole system needs to be revised, the rules are mountainous. . . . As a local grassroots Democratic club, for us, the rules, regulations, paperwork, filings are so complex, and if something is missed, fines are issued . . . this makes it impossible for a group of volunteers to operate in a relatively small way in the process, without expensive, professional assistance from one of few professionals who understand it. . . .

Comment of Diane Valentino, Agency Procedures and Processes (Dec. 12, 2008) <http://www.fec.gov/law/policy/enforcement/2009/comments/comm29.pdf>. Another individual also noted the burdens which demand professional help:

> I have just started a political action committee. The record-keeping burden is simply unbearable! I believe this red tape has the effect of deterring grassroots participation in the political process. If I did not have hours to volunteer to the PAC, we just could not participate. This favors the large PACs that can hire professionals to run the PAC.

Comment of Jason Eugene Call, Agency Procedures and Processes (Dec. 17, 2008) http://www.fec.gov/law/

policy/enforcement/2009/comments/comm30.pdf>; *see also Citizens United*, 130 S. Ct. at 897 (noting that PAC regulations might explain why fewer than 2,000 of the millions of corporations have PACs).

"Relative simplicity of operation" does not eliminate these organizational requirements, contrary to the court of appeals' belief. The burdensome organizational requirements imposed on a PAC are the same irrespective of how an organization chooses to operate. The legal obligations of PACs are the same, which is why the lower court's decision to allow the government to require a group to function as a PAC is such a consequential ruling for the country.

2. The court of appeals erroneously concluded that additional reporting requirements by PACs are "minimal."

The organizational requirements are "just the beginning." *Citizens United*, 130 S. Ct. at 897. PACs must also comply with an entirely different, and much more complex and confusing reporting scheme than that used by expenditure-specific filers. The Federal Election Campaign Act (FECA) is 244 pages, www.fec.gov/law/feca/feca.pdf, and there are 567 pages of regulations, www.fec.gov/law/cfr/11_cfr.pdf. There have been over 1,803 advisory opinions issued since 1975, http://saos.nictusa.com/saos/searchao, over 1,200 pages of explanations and justifications for regulations in the *Federal Register*, www.fec.gov/law/cfr/ej_

main.shtml, and more than 379 court cases, www.fec.gov/law/litigationalpha.shtml.

There are reporting forms with instructions, www.fec.gov/general/library.shtml, campaign guides and brochures, www.fec.gov/general/library.shtml. Other sources of information regarding enforcement of laws and regulations are found in audit reports, www.fec.gov/audits/audit_reports_auth.shtml, and in over 6000 Matters under Review, http://eqs.nictusa.com/eqs/searcheqs.

It is true that the FEC is required by law to provide resources and to assist PACs with compliance with these complex requirements. However, this legal duty is a tacit acknowledgment of the pitfalls inherent in operating as a PAC. Moreover, the FEC's attempt to fulfill its statutory duty does not sufficiently ameliorate the burdens placed upon PACs by the complexity of PAC reporting.

For example, PACs that expect to receive or make contributions or expenditures in excess of $50,000 in a calendar year are required to file reports electronically with the FEC. 11 C.F.R. § 104.18(a)(i) and (ii). Although the FEC provides free filing software, this does not lessen the burden placed on many PACs. As one commenter noted, "[t]he current software provided – FECFile – is clunky and confusing. . . . The free FEC software need not be as fully-featured as commercial packages available to campaigns, but it should be easy to use so that low-budget candidates and committees are able to file reports without

recourse to prohibitively expensive applications. . . ." Comment of Peter d'Errico, Agency Procedures and Processes (Dec. 19, 2009) <http://www.fec.gov/law/policy/enforcement/2009/comments/comm14.pdf>.

Another commenter stated:

> The sample formats for transmitting data were poorly explained, the program was extremely convoluted and not user friendly. It shouldn't require a Master's degree in both Accounting and Systems Analysis to use it. And the experience required to use the program severely hampers the ability of new candidates with limited funds to run for public office.

Comment of Gloria Bram at ¶3.

The barrier to exercising the right to association due to being regulated as a PAC is demonstrated in an experiment conducted by Dr. Milyo. In 2007, 255 subjects attempted to comply with PAC reporting laws from 3 states. Jeffrey Milyo, Ph.D., *Campaign Finance Red Tape: Strangling Free Speech & Political Debate*, at 27, Institute for Justice (Oct. 2007; last visited August 19, 2010) <www.ij.org/publications/other/campaign-finance-red-tape.html> ("Milyo"). The difficulties of complying with PAC reporting laws was evident: not one subject completed all of the tasks correctly. *Id.* at 8. This is problematic because for "even a very small group with just a few contributors and expenditures, missing one filing deadline might generate hundreds of thousands of dollars in fines, or

more." *Id.* at 3. Almost 89% of the participants agreed that when the specter of fines and punishment for incorrect compliance was raised, many people would be deterred from engaging in independent political activity altogether. *Id.* at 14-16. Or, their participation in the political process was delayed for years:

> Even with [my] limited experience I found this exercise to be complicated and mentally challenging. I took nearly the alloted [sic] amount of time to complete the forms and still made two major errors. The burdensome paper work and fines imposed for errors in reporting proved to be a hurdle that prevented the formation of our PAC . . . for a number of years.

Id at 18; *see also Citizens United*, 130 S. Ct. at 898 (noting onerous restrictions may prevent PAC formation and that "PACs, furthermore, must exist before they can speak").

In another reporting experiment, California's Bipartisan Commission found that even participants with backgrounds in campaigns could not generate a form without making multiple mistakes, even with using a fairly simple set of mock campaign data. Bipartisan Commission at 69. Those without a campaign background spent up to 3 hours completing the forms; some gave up in frustration. *Id.* Both those with campaign experience and those without it felt uncomfortable and uncertain about some of the responses on their prepared reports. *Id.*

3. The PAC regulatory scheme also imposes significant administrative burdens.

The burdens on a PAC do not end with the filing of its reports. After a report is filed with the FEC, it is reviewed by an analyst in the Reports Analysis Division (RAD). If the analyst believes there is an error, however slight, the PAC will receive a "request for additional information" ("RFAI"). The PAC is required to respond to the RFAI, and in some cases, must amend reports. RFAI's themselves can create substantial burdens for small and large PACs alike. *See* Comment of Jan Baran, FEC Agency Procedures at 10 (Jan. 5, 2009) <http://www.fec.gov/law/policy/enforcement/2009/comments/comm33.pdf> ("These RFAIs are redundant and impose significant burdens on the recipients.").

The FEC may also audit the PAC. One practitioner described the impact of the audit process on a PAC as potentially "catastrophic." Testimony of Marc Elias, FEC Public Hearing on Agency Practices and Procedures at 26 (Jan. 14, 2009) <http://www.fec.gov/law/policy/enforcement/2009/01141509hearingtranscript.pdf>. Mr. Elias went on to explain:

> The FEC – an FEC audit, for those of you who are not here and have never been through it, is equivalent to those life audits that the IRS did and drew so much criticism for. It is not "let us come in and spend a few weeks talking to you and looking at some records." It is "give us every piece of paper

> that the committee has ever generated over a cycle." We will look at every check. We will look at every disbursement. We will look at every invitation. We will question everything and anything you have done during the course of this election cycle. It is extremely burdensome.

Id.

Post-*Citizens United*, citizens now face the unhappy choice of remaining quiet or becoming burdened by the PAC regulatory scheme. Imposing this scheme on non-corrupting associations cannot be squared with this Court's precedents. *See Citizens United*, 130 S. Ct. at 908, 910. The Court should take this opportunity to reiterate that the PAC regulatory scheme is not only burdensome, but that it may not be imposed in the absence of non-corrupting speech.

II. The Consequences Of Allowing The Decision Below To Stand: Reduced Participation By Citizen Groups In The Political Process.

Refusal to review the decision will seriously erode the federal constitutional policy in favor of free speech and may well chill the exercise of free speech rights. *Nike, Inc. v. Kasky*, 539 U.S. 654, 681-82 (2003) (Breyer, J., dissenting).

A. The lower court's decision allows the government to impose onerous burdens on associations of citizens wishing to exercise their rights of political speech.

Expenditure-specific disclosure is done only if and when an independent expenditure is made. Once the independent expenditure is disclosed, no additional reports are required assuming no additional expenditures are made. By contrast, PAC reporting is ongoing and is required whether or not expenditures are made; it does not end until termination of the PAC. PAC reporting requirements thus severely burden speech by restricting spontaneous expression, especially for associations that do not intend to continue to speak after an election. *See MCFL*, 479 U.S. at 254 n.7 (PAC burdens serve as a disincentive for such organizations to engage in political speech.). Newcomers are often unable to organize quickly enough to speak, *see Citizens United*, 130 S. Ct. at 898 ("Given the onerous restrictions, a corporation may not be able to establish a PAC in time to make its views known regarding candidates and issues in a current campaign."), and they are intimidated by the ongoing burdens that operating as a PAC entail. The numerous requirements and steep learning curve not only dampen enthusiasm of new associations, they often cause such citizens to choose not to speak altogether.

Both the Milyo and California studies show that PAC reporting requirements are so complex, that even those with accounting and campaign backgrounds

have difficulty complying. *See MCFL*, 479 U.S. at 256 (noting "practical effect" of PAC burdens is "to make engaging in protected speech a severely demanding task"). Complex reporting is a burden in and of itself, but it also creates other burdens – administrative fines and investigations from simple errors, and deterrence of participation in the political process.

The subjects in Dr. Milyo's experiment had little doubt that the burdens of PAC compliance, especially when combined with the threat of severe penalties, would chill participation:

> Subjects were sincerely frustrated in their attempts to complete the disclosure forms – and believed these difficulties would deter political activity. . . . About two-thirds of respondents agreed that the disclosure requirements would deter many people from engaging in independent political activity. That figure rose to 85% to 89% when the specter of fines and punishment for incorrect compliance was raised.

Milyo at 14-16. After the experiment, subjects were given the opportunity to comment. By a ratio of more than 20 to one, the comments were negative, and included:

> "A lawyer would have a hard time wading through this disclosure mess and we read legal jargon all the time."
>
> "Good Lord! I would never volunteer to do this for any committee."

> "Worse than the IRS!"
>
> "Seriously, a person needs a lawyer to do this correctly."

Id. at 17.

Recent FEC enforcement actions have demonstrated the complexities of reporting and the threat of fines from technical violations, and provide real-life examples of how the FEC's complex procedures and processes burden citizens, particularly the inexperienced, and how "being subjected to such treatment leads many to swear off future involvement in the federal election process." *Statement of Reasons of Commissioners Petersen, Hunter and McGahn II*, FEC MURS 5957, 6031 at 1 <http://eqs.nictusa.com/eqsdocs/29044243959.pdf>.

The FEC's commissioners have noted the widespread problem of burdensome requirements that deter participation. "We have been struck by the number of committees, including separate segregated funds of corporations, that seek to terminate after encountering the regulatory burdens associated with 'political committee' status the court noted in *GOPAC*." *Statement of Reasons of Commissioners Petersen, Hunter and McGahn II*, FEC MUR 6005 at 4 n.10 <http://eqs.nictusa.com/eqsdocs/29044234461.pdf> ("MUR 6005) (citing five committees). This was reaffirmed in the California study:

> Nothing discourages the citizenry from participating in the political process more quickly or completely than a political system that

> is permitted to become unduly complex and incomprehensible. If the rules of the game are too difficult or complicated for the average citizen to readily understand them, the citizens are naturally repelled by that complexity. The average citizen may then rationally choose to opt out of the process rather than attempt to maneuver through the difficulties and expense of obtaining the necessary legal or technical assistance. Such complexity then runs counter to the purpose of government to encourage public participation.

See Bipartisan Commission at 34.

It is therefore clear that the lower court's ruling, if allowed to stand, will create a chilling effect across the country and significantly burden the exercise of core First Amendment freedoms.

B. The lower court's decision has generated uncertainty among associations of citizens wishing to speak, thereby chilling their First Amendment rights.

The lower court's decision creating a new type of PAC – an independent expenditure PAC – brings the total number of "distinct entities" regulated by the FEC to 72. *Citizens United*, 130 S. Ct. at 895. Associations unclear about how the ruling below applies to them must choose not to speak, guess about the ruling's application and hope they're correct, or request an advisory opinion from the FEC. *See Citizens*

United, 130 S. Ct. at 896. The latter option operates as a prior restraint particularly on ad hoc associations that form quickly in the heat of an election. *See id.* at 895.

Prior advisory opinions may not be relied upon by other would-be speakers unless their situation is "indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered." 2 U.S.C. § 437f(c)(1)(B). Rarely are situations "indistinguishable in all its material aspects." For example, the use of excess campaign funds has been the subject of over 350 advisory opinions. http://saos.nictusa.com/saos/searchao?SUBMIT=clear_basic (search term "excess campaign funds"). Therefore, recent advisory opinions regarding independent expenditure groups provide little comfort for others. Unless this Court reviews the case, there will remain great uncertainty for citizens. *See* 2 U.S.C. § 437f(b) (FEC cannot properly establish binding rule of law in an advisory opinion).

C. The lower court's holding allows continued application of the "major purpose" test by the Federal Election Commission, which chills non-corrupting speech.

The Court should take the opportunity to hold that PAC registration and the full panoply of PAC burdens may not be imposed on non-corrupting speech, regardless of the major purpose of the association. Such a holding would serve two important

purposes. First, it would avoid the imposition of PAC burdens on organizations engaging in non-corrupting speech. Second, it would declare the "major purpose" test irrelevant whenever non-corrupting speech is at issue. This would provide associations a ready defense to intrusive and burdensome "major purpose" investigations, which themselves may violate the First Amendment. *See Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("Merely to summon a witness and compel him, against his will, to disclose the nature of his past expressions and associations is a measure of governmental interference in these matters."); *see also AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003) (*quoting FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981)) ("Unique among federal administrative agencies, the Federal Election Commission has as its sole purpose the regulation of core constitutionally protected activity – 'the behavior of individuals and groups only insofar as they act, speak and associate for political purposes.'").

Currently, associations are subjected to onerous investigations into what their true "major purpose" is, regardless of the fact that their protected speech poses no threat of corruption. If anyone wants to silence the organization's speech, it need only employ a weapon in the political arsenal – an FEC complaint. *See* Testimony of Jan Baran, FEC Public Hearing on Agency Practices and Procedures at 6 (Jan. 14, 2009) <http://www.fec.gov/law/policy/enforcement/2009/0114150 9 hearingtranscript.pdf> ("I think it's a serious problem.

I think that there is with some regularity, and I think Bob Bauer even suggested that complaints get filed in the heat of a campaign in order to grab a headline.").

There are many examples from which to choose, but a recent complaint highlights this danger well. The American Leadership Project (ALP), a § 527 organization, ran ads in Ohio calling on Senator Clinton to "keep on fighting" for certain issues. MUR 6005 at 2. On April 30, 2008, counsel for Obama for America filed a complaint against the organization, alleging it violated the FECA by failing to register as a PAC. On February 25, 2009, the Commission voted to take no further action and closed the case. However, the complaint fulfilled its purpose – it tied ALP up in the FEC's enforcement process until well after the convention. *See Statement for the Record of Commissioner Smith*, FEC MUR 4624 at 2 (Nov. 6, 2001) <http://eqs.nictusa.com/eqsdocs/0000018E.pdf> ("These complaints are usually filed as much to harass, annoy, chill, and dissuade their opponents from speaking as to vindicate any public interest in preventing 'corruption or the appearance of corruption.'").

One practitioner correctly points out the fear that non-PACs face: "All unregistered organizations of whatever kind that are seen to influence elections – or that are suspected of this activity – will undergo extensive examination." Robert Bauer, More Soft Money Hard Law at ¶9 (Feb. 1, 2007) <http://www.moresoftmoneyhardlaw.com/news.html?AID=920>. Complaints lead to FEC investigations, which are costly and chilling, and which consists of "an extensive

examination of the organization," to determine its major purpose. FEC, Political Committee Status, 72 Fed. Reg. 5595, 5606 (Feb. 7, 2007).

The burdens arising out of these investigations clearly demonstrate that the "major purpose" test should not be permitted to be used as a political weapon to silence opponents. If this Court holds that independent expenditure groups do not trigger PAC registration no matter what their major purpose, then the major purpose test need not be applied if only non-corrupting speech is involved. This will enable citizen groups to avoid a burdensome investigation into their major purpose if their speech is non-corrupting, as a matter of law. While it may be true that post-*Citizens United* associations can speak freely, the practical reality is just the opposite. Until the application of the major purpose test is limited to corrupting speech, the threat of PAC status, and the intrusive investigation that precedes it, is always there.

This Court should grant *certiorari* and reverse the lower court's holding that PAC registration and reporting requirements are not unduly burdensome for citizen associations that only make independent expenditures.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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